

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1910.

ORIGINAL No. 17.

IN RE WALTER J. GREGORY, PETITIONER.

**PETITIONER'S BRIEF IN SUPPORT OF
PETITION FOR HABEAS CORPUS.**

Statement.

The information in this case, as shown on page 12 of the Petition (which contains the full record of the case), charged that Petitioner "did engage in the business of a gift enterprise contrary to and in violation of Sec. 1177 of the Revised Statutes relating to the District of Columbia."

Said Sec. 1177 is as follows :

" Every person who shall in any manner engage in any gift enterprise in the District shall on conviction thereof in the police court on information filed for and on behalf of the District, pay a fine not exceeding one thousand dollars (\$1,000) or be imprisoned in the District jail not less than one nor more than six months, or both, in the discretion of the court."

This Section does not define "Gift Enterprises". Such definition is found in the Laws of the District of Columbia, 1871-73, Part II., pages 96, 97, as follows :

"Every person who shall sell or offer for sale any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition or performance, or other place of amusement, with the promise, expressed or implied, to give or bestow, or in any manner hold out the promise of gift or bestowal, of any article or thing, for and in consideration of the purchase by any person of any article or thing, whether the object shall be for individual gain or for the benefit of any institution of whatever character, or for any purpose whatever, shall be regarded as a gift enterprise."

Eliminating verbiage and paraphrasing this language in its application to retail sales of merchandise, it would read as follows :

"No person shall sell any article of merchandise and promise to give any other article in consideration of the purchase. To do so is to be engaged in a 'gift enterprise' and is a criminal act."

This definition of a "Gift Enterprise" was expressly applied to Sec. 1177 by the Court of Appeals of the District in the case of *Lansburgh*, 11 App. D. C., 512 (1897) ; and by the same Court in this case, where it said : "Subsequently said act was embodied in the Revised Statutes of the District of Columbia in sections 1176 and 1177 thereof" (Petition, p. 41, par. 2, etc.) ; and by *MULLOWNEY, J.*, in the Police Court in this very case (petition, p. 30).

In its opinion in the case of *District vs. Kraft* (Petition, pp. 40, 41, 42), the Court of Appeals reviews the history of

Sec. 1177, and shows that it is the codification of the Acts of 1871 and 1873, and that the definition of "gift enterprise" contained in said Acts governs the construction of Sec. 1177, and goes on to say :

(Petition, p. 41) :

" In *Lansburgh vs. D. C.*, *supra*, it was held : 1. That this statute was within the police power of Congress under its exclusive jurisdiction over the District of Columbia : 2. That it was not too broad in its scope of inclusion of prohibited acts to constitute a valid exercise of the power of Congress : 3. That the acts charged constituted engaging in the business of a gift enterprise within the meaning of sections 1176 and 1177, R. S. D. C. In respect of this last conclusion it was said (p. 520) : ' Without the necessity of declaring that the acts proved in this case constitute the conduct of a lottery or gift enterprise, as these words are commonly understood, or even of finding that the element of chance operates intentionally and distinctively in the scheme of the trading stamp company, we think, nevertheless, that they come within the prohibition of the statute, which, as before said, furnishes its own definition of 'gift enterprise.' Although one of the most shrewdly planned of the many devices to obtain something for nothing, and one apparently novel, it could hardly have come more clearly within the scope of the statute had it been well known and expressly within the contemplation of Congress at the time of the enactment '."

The Court further said (Petition, p. 45) :

" A vigorous attack has been made on the Act as unconstitutional, because it is an unreasonable interference with the freedom of trade and contract. While that question was decided in the *Lansburgh* case, we

are asked to reconsider it on the ground that the soundness of that decision has been denied in many cases in other jurisdictions."

The Answer of the Warden filed herein expressly bases the jurisdiction of the Police Court upon the Act of 1873 (Answer, pp. 1-2).

In the Brief of the corporation counsel opposing the petition for *Writ of Certiorari* in this case, he says (p. 2):

"The Act of Congress under consideration was first construed in *Lansburgh v. District of Columbia*, 11 App. D. C., 512, decided Dec. 7, 1897."

And again (p. 7) he says:

"The Court of Appeals having construed the statute in the *Lansburgh* case, and such decision since 1897 having been the accepted and followed law in the District of Columbia, and the decision in the present case having been in accordance with the opinion announced in that case, its decision should be permitted to remain unchallenged."

Furthermore, the information upon which the Petitioner was found guilty merely charges him with engaging "in the business of a gift enterprise." This standing alone is meaningless, and would not furnish the basis for an indictment except in connection with the agreed statement of facts. This statement of facts sets forth a case which would come within the definition of "gift enterprises" as defined by the Act of 1871, and charges a perfectly innocent business transaction involving neither moral turpitude, nor any element of chance.

It is therefore respectfully submitted that Sec. 1177 must be construed in the light of the foregoing definition, because in the first place the history of a statute is the best guide to the meaning of undefined phrases contained in it, and in

the second place because the reference to that section in the information is limited by the statement of facts thereto annexed.

If, however, we are mistaken in this position, and this Court holds that the definition does not control Sec. 1177, then we submit that the words "gift enterprise" as contained in this section must be construed under the decisions applicable thereto, all of which hold that there must be an element of chance in the transaction. Petitioner is not charged with conducting a "gift enterprise" including an element of chance. In this very case the Court of Appeals has held *that no such element need be found*, and based its decision on the increased cost of living, and the fact that Petitioner is "an entirely unnecessary middleman" working "for his own profit solely."

The subject of "Gift Enterprises" is more fully considered later in this brief (p. 32).

The facts in this case, about which there is no dispute, either bring the Petitioner within or exclude him from the above definition. The Court of Appeals has held that the facts fall within the statute, "which, as before said, furnishes its own definition of 'gift enterprise'".

If the facts fall within the statute, Petitioner contends that the statute is unconstitutional. If the facts do not fall within the statute, Petitioner submits that he is imprisoned unlawfully, and should be discharged. The Court may find that the foregoing definition applies to Sec. 1177, and that the statute is unconstitutional. If so, the Police Court had no jurisdiction; or it may find that the facts in this case cannot support the judgment of the District Court. In either case, it is submitted that Petitioner is unlawfully deprived of his liberty.

The agreed statement of facts may be condensed into a single sentence: viz—By contract with certain merchants, Petitioner offers certain articles of merchandise to the customers of such merchants, in consideration of cash

purchases made at the merchants' stores, the merchants giving to their customers evidence of such cash payment, in the form of Stamps, at the rate of one Stamp for each ten cents paid, such Stamps being used to identify to Petitioner's Company the cash-paying customers, and being redeemed by Petitioner in cash at the rate of ten cents per hundred, or in merchandise at the rate of one Steel Pen for each single stamp, or in articles of merchandise of the value of \$2.25 for each 990 Stamps presented for redemption. (See Petition, p. 13, for copy of contract.)

Petitioner was discharged in the Police Court. On appeal by the District, the Court of Appeals reversed the judgment, and upon further proceedings Petitioner was fined \$100, and in default of payment was sentenced to five months imprisonment. Petitioner was imprisoned, and upon application to this Court was admitted to bail. He moved for permission to apply for a Writ of *Habeas Corpus*, on which the Warden was ordered to show cause on November 28, 1910, why the Writ should not issue. The matter now comes before the Court upon the Petition and the Answer to such order.

The importance of this case is manifest from the consideration that the question involved applies not only to the powers of Congress, but to the powers of the legislature of every State. The Fifth Amendment, which we invoke, prohibits the Congress of the United States from depriving any person of life, liberty or property without due process of law. The Fourteenth Amendment, in the same language, applies a like prohibition to the States. If Congress may do here in this District what the Court of Appeals has held in this case it may do, the legislature of every State in the Union has the same power.

The consequences of the decision in this case, even without regard to the far-reaching effect of the principles which underlie it, of themselves justify the interposition of this court. There is no business of such universal application

to all other business as advertising. The premium system of advertising, that is, the making of a gift as an inducement to a purchase, in its organized and highly-specialized form, carried on as a business, is now in use throughout the whole commercial world, and has reached its highest development in the United States. Millions of dollars are invested in factories producing articles of merchandise of almost every description to be used in this manner, and it is no exaggeration to say that upwards of one thousand million dollars are invested in businesses of national scope which use the premium system of obtaining and retaining customers. Manufacturers of soap, coffee, tea, starch, tobacco, chocolate, matches, and numerous other products, as well as also many of the largest newspapers and magazines, many of the largest department stores and retail stores in the United States seek to increase their business by offering article of merchandise of standard value and usefulness, of very great variety, to those who buy their goods in certain quantities. As evidence of payment the customers receive a token or coupon for each package or pound or for each five cents or ten cents represented in the purchase, and for these coupons or tokens in fixed numbers they receive the specified articles from the seller of the goods.

The Sperry & Hutchinson Company, the real party in interest in this case, is doing for many manufacturers, periodicals, and retail merchants what individuals in each of these classes are doing for themselves. By furnishing each of its clients with the same coupon, which represents a ten-cent purchase, and maintaining over 450 redemption stations throughout the United States, each of its clients obtains the advantage of the other's customers, and the customers more quickly collect the number of coupons required for any particular article carried in the company's store.

POINT I.

This court has original jurisdiction to issue the Writ of Habeas Corpus in this case.

That an application to this Court in the first instance for a Writ of *Habeas Corpus* on behalf of one imprisoned pursuant to the judgment of an inferior Court in a case where it is without jurisdiction or exceeded its powers, or proceeded under an unconstitutional legislative act, will be entertained by this Court as part of its appellate jurisdiction has clearly and distinctly been held on numerous occasions by this Court. Some of the leading cases in which this precise question has been considered are : *Ex parte Bollman* and *Swartwout*, 4th Cranch, 75 ; *Ex parte Yerger*, 8th Wallace, 85 ; *Ex parte Virginia*, 100 U. S., 339, and *Ex parte Siebold*, 100 U. S., 371.

The cases in this Court holding that the Writ of *Habeas Corpus* cannot be made to do duty as a writ of error have no application here. We are not asking the Court to weigh any evidence. The facts are admitted. There are only two possible questions in the case, and they are both questions of law.

The first is whether Congress has undertaken to prohibit what the Petitioner admits that he did. If Congress did not so intend, then it is conceded on all hands that the Court below was without jurisdiction, because what the Petitioner admits that he did was not made a penal offense either by the common law or by any act of Congress.

The second question is, if Congress did intend to prohibit what Petitioner did, has it the power to prohibit the business transactions disclosed by the Record. If it has not such power, then the police court was without jurisdiction, because a void act cannot confer jurisdiction on any Court.

The Court of Appeals, in the Kraft case agrees with the numerous other Courts which have considered the question

that in this Trading Stamp business, so called, that there is no element of chance. Its decision is based solely and squarely on the ground that any merchant may be prevented by law from bringing cash customers to his store by the means set out in this record on the theory that such means require the services of a third party at greater or less expense to the merchant.

This Court on applications made directly to it has either issued the Writ of *Habeas Corpus*, or decided on the application for the writ the questions raised by the petitions therefor, in numerous cases, a few of which are :

- Ex parte* Rowland, 104 U. S., 604.
- Ex parte* Curtis, 106 U. S., 371.
- Ex parte* Yarbrough, 110 U. S., 651.
- Ex parte* Fiske, 113 U. S., 713.
- In re* Ayres, 123 U. S., 443.
- In re* Sawyer, 124 U. S., 200.
- In re* Medley, 134 U. S., 160.
- In re* Neagle, 135 U. S., 1.
- In re* Burrus, 136 U. S., 586.
- In re* Mayfield, 141 U. S., 107.
- In re* Kollock, 165 U. S., 526.
- In re* Watts and Sachs, 190 U. S., 1.
- In re* Heff, 197 U. S., 488.
- In re* Lincoln, 202 U. S., 178.

In *Ex parte* Heff, 197 U. S., 488, the Circuit Court of Appeals had in another case decided the exact question at issue. The petitioner in the Heff case presented his application for *Habeas Corpus* direct to this Court. Leave to file the petition was granted; the Writ issued and the Petitioner was discharged.

In the present case, the Court of Appeals has decided the contentions of the Petitioner adversely to him.

It is suggested in the Answer of the Warden that no notice of intention to apply to the Court of Appeals for a Writ of Error was given, and no exceptions were filed.

The futility of a Writ of Error in the *very case just decided* by the Court of Appeals is apparent. It would be asking that Court to reverse itself. That request had already been made and denied. The Court of Appeals refers to it as follows :

"A vigorous attack has been made on the act as unconstitutional because it is an unreasonable interference with the freedom of trade and contract. While that question was decided in the *Lansburgh case*, *we are asked to reconsider it on the ground that the soundness of that decision has been denied in many cases in other jurisdictions.*"

This Court will recall that it denied the Writ of *Certiorari* in this case, by which it was sought to review the decision in the Court of Appeals.

Petitioner has therefore exhausted every remedy, and there is nothing left to him but to apply for a writ of *habeas corpus*. He is imprisoned for doing a lawful act, and has applied for release to the only Court with power to grant it.

POINT II.

The prohibition contained in this statute is in violation of the Fifth Amendment to the Constitution of the United States, in that it deprives petitioner of liberty and property without due process of law, and the Courts below were, therefore, without jurisdiction to try and sentence petitioner.

The Fifth Amendment applies to residents of the District of Columbia—*Callan vs. Wilson*, 127 U. S., 540; and is a restriction upon the legislative powers of the Government—*Murray vs. Hoboken Land Co.*, 18 How., 277.

Petitioner submits that it is not within the police power of Congress to prohibit the giving of an article of merchandise in consideration of the purchase of another article of merchandise. The Statute here is valid only if passed within the police power of Congress. That power is not unlimited. It is subordinate to the Constitution and subject to review by the Courts. While the limits of this power have not been defined, it is submitted that it extends only to such legislation as will promote the public health, public safety or public morals, or to business affected with a public interest, as the following Federal and State authorities will show :

In *Lochner vs. New York*, 198 U. S., 47-53, the Court said the exercise of the police power "must relate to the safety, health, morals and general welfare of the public."

"It belongs to that department to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of *public morals, the public health, or the public safety.*"

Mugler vs. Kansas, 123 U. S., 623, 661 (1887).

"The power which the States have of prohibiting such use by individuals of their property as will be prejudicial to the *health, the morals, or the safety* of the public."

Ibid, p. 669.

"The extent and limits of what is known as the 'police power' have been a fruitful subject of discussion in the Appellate Courts of nearly every State in the Union. It is universally conceded to include everything essential to the public safety, health and morals, and to justify the destruction or abatement, by summary proceedings, of whatever may be regarded as a public nuisance."

Lawton vs. Steele, 152 U. S., 133, 136 (1894).

"It is also true that the police power of the legislature is not unlimited, and is subject to judicial review, and when exerted in an arbitrary or oppressive manner, such laws may be annulled as violative of rights protected by the Constitution."

McLean vs. Arkansas, 211 U. S., 539, 547.

"The mere fact that an enactment purports to be for the protection of public safety, health or morals, is not conclusive upon the courts."

Otis vs. Parker, 187 U. S., 606, 608.

In the case of *O'Keefe vs. Somerville*, 190 Mass., 110, at page 114, the Supreme Court of Massachusetts said :

"The restrictions upon conduct which may be imposed in the exercise of the police power include everything that may be necessary in the interest of the *public health, the public safety or the public morals* and they include nothing more."

In *Young vs. Commonwealth*, 101 Va., 853 at page 863, the Court said :

“It has been repeatedly held that the only authority which a State or municipality has for enacting legislation of this character grows out of what is known as its ‘police power.’ This has been generally defined to be that power which a State or municipality has to enact laws or ordinances which pertain to the public safety, the public health, or the public morals. The proposition above stated is so universally recognized that it does not require the citation of authorities. It follows, therefore, that unless the statute in question is one which in some way provides for the public safety, pertains to the *public health*, or *concerns the public morals*, it is not a valid exercise of the police power.”

In *People vs. Gillson*, 109 N. Y., 389, the Court (PECKHAM, J.) adopted the process of elimination and, after showing that the statute in question had no direct or indirect relation to the public health, the public safety or the public morals, held a law unconstitutional, which was practically the same as the law now under consideration.

In *People vs. Zimmerman*, 102 App. Div., 103, the Court reviewed the New York decisions concerning statutes which interfered with private business and said, at page 105 :

“It is not a novel expedient for the Legislature to interfere with trade. The pretext for this kind of legislation is that the *public health* and *public morals* will be conserved thereby.”

The Court reviewed many cases and went on to say, at page 106 :

"We have referred to these authorities for the purpose of emphasizing the proposition that the constitutional provisions, insuring a person the largest liberty in his business if only it be lawful and not violative of the public welfare, are still maintained in their integrity."

Finally the Court emphasized the limitations upon the police power, at page 111, as follows:

"The police power, while sufficiently comprehensive to meet most every exigency involving the *public health, safety or morals*, is subsidiary to the Constitution. * * *

"But it is also a landmark of our Constitution that the individual is permitted to engage in any lawful pursuit in a legitimate and honorable manner, and he is above interference even by the Legislature if he keeps within the limits suggested."

"One of the legitimate and most important functions of civil government is acknowledged to be that of providing for the welfare of the people by making and enforcing laws to preserve and promote the *public health, the public morals and the public safety*."

State vs. Hyman, 98 Md., 596, 613.

"It is not within the power of the General Assembly, under the pretence of exercising the police power of the State, to enact laws not necessary to the preservation of the health and safety of the community that will be oppressive and burdensome upon the citizen."

Toledo, etc. Rail. Co. vs. Jacksonville, 67 Ill., 37, 40 (1873).

"Thus it is perfectly competent to legislate concerning married women, minors, insane persons, bankers, common carriers, and the like; and the power of the Legislature to prescribe police regulations applicable to localities and classes is very great, because such laws are designed to protect property, and the safety, health and morals of the citizens."

State vs. Loomis, 115 Mo., 307, 313 (1893).

"We see nothing in such a stamp or coupon which is outside of the constitutional right of citizens to make contracts concerning property; nothing which wrongfully interferes with the lawful rights of other persons; and nothing which the police power can reach as touching the public safety, the public health, or the public morals."

Ex parte Drexel & Holland, 147 Cal., 763, 767.

"But for all practical purposes, the police power of the State may be shortly defined to be the power of the Legislature to make such regulations relating to personal and property rights as look to the *public health, public safety and public morals*."

State vs. Dalton, 22 R. I., 77, 80.

Assuming that the police power extends only to such matters as effect the public health, safety and morals, the inquiry is to the point. In what way does the Statute under consideration affect the public health, safety and morals? It is clear that the public health and the public safety are not in any manner affected by the gift of an article of merchandise as an inducement for the sale of another article, and it only remains to consider whether the facts conceded in this case in any manner affect the public morals.

Brief Explanation of Petitioner's Business.

The Sperry & Hutchinson Company is the real defendant in this case; Petitioner is its local manager in Washington. It is engaged in advertising the business of certain merchants (called Subscribers) with whom it enters into special written contracts, a copy of which is annexed to the agreed Statement of Facts. In its business there are two special features: First, to enlarge the trade of its Subscribers and increase their gross returns; second, to induce the customers of its Subscribers to pay cash for purchases rather than to buy upon credit.

To carry out the first of these objects, it prints 50,000 directories of its Subscribers, giving their names, business and addresses, which directories it distributes from house to house by canvassers who inform householders of the advantages of trading with said Subscribers and thereby try to induce the public to trade with said Subscribers.

It distributes circulars in the same manner, which advertise the business of its Subscribers by specially attractive features which bring its subscribers to public attention; it supplies its Subscribers with advertising signs of a novel and attractive form in cardboard and metal for display outside and inside their stores; and by various other methods it endeavors to bring its Subscribers especially to the attention of the buying public, so that when making purchases, the public will be predisposed to deal with them.

To accomplish the second object of the Company's business—the increase of cash sales—it furnishes its Subscribers with coupons or stamps, known as "Green Trading Stamps," which they agree to give to their cash-paying customers in the proportion of one Stamp for each ten cents received, "as a token of such payment and as a rebate or discount," (Petition, p. 14, near end of Par. 4). From the merchant's point of view these Stamps represent a discount

for small amounts of cash payments, and from the Company's point of view, when returned to it they are receipts or evidence of cash payments, and "identify to said Company the cash-paying customers of its Subscribers who may be entitled to the discount redemption thereof," (Petition, p. 15, Par. 1).

When said Stamps are issued by the Subscribing merchants, the holder has certain rights in connection therewith under the Subscriber's contract, and under the statement on the Stamps, and in the Trading Stamp books issued by the Company. These rights are :

- (1) To have the Stamps redeemed by the Company in cash at the rate of Ten Cents per hundred ;
- (2) To have the Stamps in any number redeemed by the Company in pens, at the rate of one pen for each stamp ;
- (3) To have stamps redeemed by the Company in lots of 990 stamps by giving the holder his choice among the articles carried in the Company's stores, the general retail value of which is about \$2.25 for each article given for one book (990) of stamps.

These articles are of different value and are given in exchange for one book or two books or more books of Stamps, as the case may be. The various articles given for one book of Stamps are practically of the same value, as are those given for more than one book. It is the object of the Company to furnish articles of approximately equal value for the same number of books of its Stamps, that is, a side-board given for five books of Stamps is approximately of the same value as a dining-table or any other article of furniture given for the same number, and a rocking chair given for one book of Stamps is approximately of the same value as a picture, couch-cover, blanket or other article given for one book.

For the advertising done by the Company to enlarge the gross amount of trade and to increase the amount of cash trade of its Subscribers, and for the services rendered, the Subscriber pays at the rate of so much per thousand Stamps used. No separate charge is made for any of the different classes of advertising, which vary according to the locality and special need of the several Subscribers. The Company purchases goods in enormous quantities, and is thus enabled to provide merchandise of substantial value, and in addition furnish the other advertising matter to its Subscribers, and is able to pay the cost of advertising, cost of stamps, trading stamp books, advertising signs, circulars, newspaper advertising, etc., out of the amount paid by its Subscribers for the use of said Stamps, and under ordinary conditions leave a small percentage of profit to the Company.

Each of the Subscribers could do this advertising for himself. He could procure attractive advertising signs, trading stamps, trading stamp books, merchandise, newspaper advertising, circulars, and other forms of advertising, but he could not do it so cheaply or so well as it is done by the Company, whose business extends all over the United States, and whose stamps, books, signs, etc., are manufactured in immense quantities at the lowest price. It buys newspaper space in larger quantities than almost any other advertiser, and, therefore, gets it cheaper. It is perhaps the largest consumer of merchandise in the United States, and, therefore, buys the total products of various factories at minimum cost. It is, therefore, able to furnish more satisfactory advertising service than the individual merchant could furnish for himself. Besides, each merchant would have his own individual system, and a merchant in one class, such as groceries, would have no assistance from the merchant in another class, such as dry-goods, drugs, shoes, etc., as is in the case with the Company's system, where one Subscriber gets the benefit of the customers of another class of Subscribers.

Advertising is a special business by itself, and few merchants, especially the smaller storekeepers, have the time or capacity to carry it on successfully. The system of the Company would be considered too complicated for a merchant himself to run, except in the largest stores; but by this system the small storekeeper can obtain the same class of advertising as the largest, while at the same time he gets the benefit of other lines of trade using the same system. As the Courts have almost universally held, it is really a popular method of advertising, and its wide use proves its efficiency.

“The scheme, if such it may be termed, was only a mode of advertising by those merchants who entered into it.”

State vs. Shugart, 138 Ala., 86.

“In its ultimate analysis, the use of trading stamps by a merchant is simply a unique and attractive form of advertising, resorted to for the purpose of increasing trade. * * * When resorted to for the purpose of increasing the business to which it is connected, it occupies the same relation to that business as newspaper advertising, circulars, dodgers and the like.”

Hewin vs. Atlanta, 121 Ga., 731.

Federal and State Decisions Concerning Petitioner's Business.

In these days of sharp competition among merchants it has become common for one or another class to seek legislation for its own special benefit. Such is the source of the many laws which have sought to prohibit directly or indirectly the Petitioner's business, and which with the *single exception* of the statute under consideration have been held unconstitutional.

"It is simply one of the infinite variety of devices which are resorted to by tradespeople in these days of sharp competition, to promote the sale of their goods."

State vs. Dalton, 22 R. I., 77.

"It is further insisted by the counsel for the State that the scheme aimed at is demoralizing to legitimate business; but we see nothing in the prohibited business that can be thus characterized. It does not differ from the ordinary business, except in the method of advertising, and in lawful trade inducements. It is true that this method of doing business may enable a trader to do more business than he otherwise would and more than his competitor across the street, who does not choose to incur the expense incident to this method of advertising and increasing his business. * * *

State vs. Dodge, 76 Vt., 197.

"But the legislative prohibition of a business not harmful to society in any of its essential features, though comparatively novel and peculiar, cannot receive judicial sanction, merely because the prohibited business stimulates competition among merchants in disposing of their wares, or affords an unusual method for commercial advertising."

State vs. Ramseyer, 73 N. H., 31.

For the convenience of the Court we submit herewith the cases showing Petitioner's business to be legal.

FEDERAL DECISIONS.

- Ark. Humes vs. City of Little Rock, 138 Fed., 929.
- Hawaii Ter. of Hawaii vs. Gunst, 18 Hawaii Rep., 196.
- Ill. The Sperry & Hutchinson Co. vs. Weber, 161 Fed., 219.
- Mass. The Sperry & Hutchinson Co. vs. Temple, 137 Fed. 992.

- Ore. *Ex parte* Hutchinson, 137 Fed., 950.
 Penn. The Sperry & Hutchinson Co. vs. Brady, 134 Fed., 691.
 R. I. The Sperry & Hutchinson Co. vs. Mechanics Cloth Co., 135 Fed., 833 (cited by LURTON, J., in Park vs. Hartman, 153 Fed., 24).
 Same vs. Same, 128 Fed., 800 (cited by WHITE, J., in Bitterman vs. L. & N. R.R. Co., 207 U. S., 205).
 Wash. *Ex parte* Hutchinson, 137 Fed., 949.

STATE DECISIONS.

- Ala. State vs. Shugart, 138 Ala., 86 (1903).
 City Council of Montgomery vs. Kelly, 142 Ala., 552.
 Cal. *Ex parte* McKenna, 126 Cal., 429.
Ex parte Drexel & Holland, 147 Cal., 763.
 Col. City and County of Denver vs. Frueauff, 39 Col., 20.
 Ga. Hewin, *et al.*, vs. City of Atlanta, 121 Ga., 731.
 Mass. O'Keefe vs. Somerville, 190 Mass., 110.
 Com. vs. Emerson, 165 Mass., 149.
 Com. vs. Sisson, 178 Mass., 578.
 The Sperry & Hutchinson Co. vs. Temple, 137 Fed., 992.
 Md. Long vs. Maryland, 74 Md., 565 (1891).
 Minn. State *ex rel.* Att'y Gen'l. vs. The S. & H. Co., 126 N. W. 120 (Apr. 1910).
 N. H. State vs. Ramseyer, 73 N. H., 31 (1904).
 N. Y. People vs. Gillson, 109 N. Y., 389 (1888).
 People vs. Dycker, 72 App. Div., 308 (1902).
 People vs. Zimmerman, 102 App. Div., 103.
 N. C. Winston vs. Beeson, 135 N. C., 271.
 Penn. Com. vs. Moorhead, 7 Co. Ct. Rep., 513 (1890).
 R. I. State vs. Dalton, 22 R. I., 77 (1900).
 Vt. State vs. Dodge, 76 Vt., 197 (1904).
 Va. Young vs. Com., 101 Va., 853 (1903).

QUOTATIONS FROM TRADING STAMP CASES SHOWING THE
BUSINESS TO BE LAWFUL :

" Our conclusion is, that in so far as Chapter 142, Laws of 1909, prohibits companies or parties from issuing and redeeming trading stamps under contracts which in practice depend on chance, uncertainty or contingency, the law is a proper exercise of the police power. That the business of issuing and redeeming trading stamps, as conducted by respondents, is not attended with such elements of chance, uncertainty and contingency as to come within that provision of the Act. That the provisions requiring each Stamp to be valued and redeemed independently of other stamps, and to have printed thereon its value and character of the article offered for redemption, constitute unnecessary restrictions amounting to practical prohibition of the business as conducted by respondents, and is not a proper exercise of the police power of regulation."

State of Minnesota vs. The Sperry & Hutchinson Company, 126 N. W. Rep., 120.

" It will be observed that no element of chance enters into the plan. There are no drawings, no opportunities to win a larger sum upon a wager of any kind. The stamps have the same purchasing power in the hands of every one, and every one has the same right of selection among the complainant's stock. * * * But the most conclusive presentation of the questions now before us is found in the able and exhaustive opinion of Judge PECKHAM, now Mr. Justice PECKHAM, in *People vs. Gillson*, 117 N. E., 343, S. C., 109 N. Y., 389. That involved a scheme precisely like this save that the counter where

the tickets were surrendered and the premiums were selected was in the same store, which seems to us an immaterial difference. He examines the question in every conceivable light and holds that the New York statute forbidding such devices is an infringement of the constitutional liberties of the citizen. His opinion was followed by the Supreme Court of Maryland in *Long vs. State*, 22 Atl., 4 S. C., 74 Md., 565, and commends itself to our approval."

Humes vs. City of Little Rock, 138 Fed., 929.

"It appears that in the conduct of the trading stamp business of said company, the articles of value to be exchanged for a book of stamps are exhibited continuously and openly in a store occupied by said company. Nothing of value is required from the person presenting the books of coupons and nothing is required by the company from the collectors, except that they shall obtain the stamps in connection with cash purchases of goods. The articles to be exchanged for the stamps are *certain and fixed and only subject to the choice of the collector of the books of stamps*. * * * In the Gillson case the gift, prize, premium or reward was not to be given with the purchase of one pound of coffee, but a person purchasing one pound of coffee obtained a check which it was necessary to retain until a further purchase of a pound of coffee enabled the purchaser to obtain a gift, prize, premium or reward. Such sale of one pound of coffee with the accompanying delivery of a check for use after a further purchase, does not make a case differing in principle from an arrangement or agreement making it necessary to obtain 10 or even 990 checks before a gift,

prize, premium or reward could be received. * * * This record does not disclose any element of chance in the transaction. Even the possibility of some of the stamps never being offered for redemption is largely eliminated by there being no time or boundary limit to the collection of the stamps, and nothing in the arrangement preventing holders of small lots of stamps from combining with others to make a sufficient number of redemptions. The transaction is not a species of lottery, and does not appeal to the gambling instinct. * * * The mere fact that the stamps are redeemable by an agent of the principal or by a third person does not seem to affect the transaction so far as public safety and the general welfare of the community is concerned, or make it differ from the transaction declared to be within the prohibition of the Constitution by the *Gillson* case."

People vs. Dycker, 72 App. Div., 308.

"There is another infirmity in the statute which we apprehend renders it invalid. By subdivision five, as already noted, the business of dealing in trading stamps is reserved for the merchant or manufacturer. This creates a preferential class. The vice, it seems, is not an alluring one to buy by promise of a gift, but in permitting the promise to be fulfilled by another than the seller. It is a narrow ledge for the distinction to rest upon, when in one instance the transaction is subject to legislative control to the extent of confiscation, while in the other it goes without let or hindrance. If the seller, by arrangement with a responsible company, secures the performance of the agreement, and the arrangement is satisfactory to the buyer, it would

seem that such a plan ought not to be made a crime, while redemption by the merchant is deemed an honest transaction. The statute is not founded on the moral plane pretended, but belongs to that class of legislation designed to drive out of business a successful competitor."

People vs. Zimmerman, 102 App. Div., 103 (N. Y.).

"It appears to be simply a device to attract customers, or to induce those who have bought once to buy again, and in this respect is as innocent as any form of advertising."

Ex parte McKenna, 126 Cal., 429.

"We find nothing in the contract between Sperry & Hutchinson and the defendant nor the transaction with customers in pursuance of such contract that is not a legitimate exercise of one's right to prosecute his own business in his own way. As has already been said, it appears to be simply one of many devices fallen upon in these days of sharp competition between tradespeople to attract customers or to induce those who have bought once to buy again, and in this respect is as innocent as any other form of advertising."

Young vs. Commonwealth, 101 Va., 853.

"The giving of trading stamps is merely one way of discounting bills in consideration for immediate payment in cash, which is a common practice of merchants, and is doubtless a popular method, and advantageous to all concerned, and is not obnoxious to public policy."

Ex parte Hutchinson, 137 Fed. Rep., 949.

"The plan, as outlined in the special verdict, seems

to be one for advertising the merchant's business, and his wares, and enabling him to sell his goods for cash instead of on time. This, it must be conceded, is an advantage to him. It is also a benefit to the customer, who practically receives a discount, and who will buy more cautiously and judiciously if he pays cash, and will spend only according to his wants.

Alderman, etc. vs. Beeson, 135 N. C., 271.

"The trading stamp business is essentially legitimate, and so far as the Court can discover, it is the only way in which the small purchaser practically obtains a discount for immediate payment, whether that immediate payment is in cash or anything else. * * * So far as this case is concerned, the Court is unable to perceive from any proofs in the record, or from any suggestion, that the business of the complainant is not perfectly legitimate, honestly carried on, and, therefore, a business which the Courts ought to protect, and one which the Legislature has no right to obstruct."

The Sperry & Hutchinson Co. vs. Temple, 137 Fed., 992.

"It is the essence of complainant's business that its subscribers shall get the full benefit of its methods of advertising, and assistance. Its stamps are not, in the full sense, property. Their non-transferability is an essential element of their value, both to the complainant and its subscribers."

The Sperry & Hutchinson Co. vs. Weber & Co., 161 Fed., 219.

* * * * The character of the business shows it to be one of the legitimate and useful lines of trade,

which neither the State nor the municipality can subject to police regulations, with any color of reason."

City Council of Montgomery vs. Kelly, 142 Ala., 552.

"The scheme carried on by defendant is a form of advertising. It is intended to attract new and retain old customers on the theory of making them believe that they are getting something for nothing. In reality, a concern can well afford to give away these premiums by virtue of the additional profits made by the larger sales. In this case the defendant had the undoubted right to sell the two cigars in question. To deny that it also had the right to give the purchaser some other property in addition which he could select would be to deny its right to do business at all."

Territory of Hawaii vs. Gunst, 18 Hawaii Rep., 196.

"Indeed, an ordinary trading stamp or coupon is, in substance, a mere form of allowing discounts on cash payments, and its issuance is entirely harmless and within the constitutional right of contract. It may be distasteful to certain competitors in business; but the latter should remember that if a statute suppressing it be upheld, then other oppressive statutes might be enacted unlawfully interfering with and hampering business and the right of contract to which these competitors would strenuously but vainly object."

Ex parte Drexel-Holland, 147 Cal., 763.

"* * * Doubtless, getting from this custom the suggestion, enterprising companies conceived the plan that independent trading stamp companies

might profitably be established that would furnish to merchants for compensation stamps to deliver to purchasers; the stamps being redeemable at the trading stamp companies establishment in articles kept by it. In this way the merchant would be enabled to advertise his business by offering free of cost trading stamps which purchasers could take to the establishment of the trading stamp company and receive without charge some article equal in value to the amount represented by the trading stamps they had. * * *

Commonwealth vs. Gibson Co., 125 Ky., 440.

"The only difference referred to is the giving or delivering as a part of the sale or in connection with it, as a stamp, or other similar device, which represents an additional right of property. Because this is entirely legitimate (see cases above cited) the attempt to tax it, as a peculiar kind of sale is 'a discrimination founded upon an immaterial fact,' which renders a statute invalid. *Minot vs. Winthrop*, 162 Mass., 113-122. Taking the acts referred to in the broad terms of the description in the statute, they are not dependent for their legality upon the legislative will, nor do they call for legislative regulation. They are performed in the exercise of a natural right, and are not in any sense rights or privileges conferred by law."

O'Keefe vs. The City of Somerville, 190 Mass., 110.

"The act of 1898 cannot be taken to prohibit a rebate on the normal price of goods, or the giving of this rebate in the form of another symbol of purchasing power instead of money, as for instance a draft upon another merchant, payable in goods. * * *

Com. vs. Sisson, 178 Mass., 578.

"The trading stamp is an artificial creation. The Company, having created it, and having created a value for it, may dispose of it on such terms as it sees fit. It may, in the first instance, restrict the right to issue it for advertising purposes to such persons as it may select and to such persons as are willing to pay for it. * * *"

The Sperry & Hutchinson Co. vs. Mechanics Clothing Co., 135 Fed., 833.

The Court of Appeals opinion in this case attempts to classify the trading stamp decisions so as to show that its conclusion is not contrary to the overwhelming weight of authority. This attempt must fail upon any fair consideration of the cases, for it is plainly evident that most of the statutes were passed for the purpose of directly or indirectly *prohibiting the use of trading stamps*, in some cases by the merchants using them, in others by Petitioner's Company.

Petitioner begs to refer to the case of *City & County of Denver vs. Frueauff*, 39 Col., 20; 88 Pac., 389 (1907), which contains the clearest exposition of all the arguments contained in prior decisions. This case is especially noteworthy for its criticism on the Lansburgh decision.

The opinion refers to that case at great length, and concludes as follows :

"If the decision in that case is to be construed as announcing the doctrine that a legislative declaration that a business, lawful in itself, is a 'gift enterprise,' and is thereby rendered unlawful regardless of the fact that it wholly lacks the essential element of chance, it is at variance with the uniform current of authority, and if, as we understand it, the conclusion therein reached was because the scheme under consideration was, in the opinion of the court, ob-

noxious to public morals or detrimental to the public welfare, we decline to follow it, because it is directly opposed to the conclusion reached as to its character in all the cases in which the business of the trading stamp company has been under investigation."

The opinion in the Lansburgh and Kraft cases are fully considered on page of this brief.

POINT III.

Petitioner's business cannot be prohibited by calling it a "Gift Enterprise."

By the overwhelming weight of authority a "gift enterprise" is held to be a transaction wherein the element of chance determines how property shall be distributed.

Three of the leading Law Dictionaries define a "Gift Enterprise" to be

"A scheme for the division or distribution of certain articles of property to be determined by chance amongst those who have taken shares in the scheme."

Bouvier's Law Dic. (Rawles' Rev.), Vol. I., p. 884.

Black's Law Dic., p. 539.

Anderson's Law Dic., p. 488.

Numerous authorities in which the trading stamp business has been discussed from every point of view, hold that there is no element of chance in it, and the cases cited

specifically hold that the business cannot be included within the class known as "Gift Enterprises."

The statute attempts to prohibit the trading stamp business as it has been conducted throughout the United States, by calling it a "gift enterprise," and the only justification that can be shown for such prohibition is to adopt the meaning universally given to the term "gift enterprise"; that is, in brief, a species of lottery. But as the cases universally hold that the trading stamp business is not a species of lottery, or a "gift enterprise," Congress cannot prohibit as a "gift enterprise" something that is not such.

It should require no authority to show the reasonableness of this position, but we refer to the following :

" * * * And it is not within the power of the legislature to make that a fact which is not a fact : Edward's Ap., 108 Pa., 283, 290. Its mere declaration to the contrary will not make that a party-wall which is not a party-wall ; *Weston vs. Arnold*, L. R., 8 Ch., 1084, 1089 ; nor convert a corporation whose leading purpose is to make money for its stockholders into a benevolent institution ; *State vs. McGrath*, 95 Mo., 193 ; nor a child born out of lawful wedlock into a 'lawfully begotten' one ; Edward's Ap., *supra*. No more can it make that a lottery which is not a lottery."

Com. vs. Moorehead, 7 Co. Ct. Rep., 513, 519.

"A judicial christening can no more affect the nature of the thing itself than can a legislative christening."

Perry vs. Keene, 56 N. H., 514.

"The mere calling the business of a drummer a privilege cannot make it so."

Robbins vs. Shelby Co., 120 U. S., 489.

" * * * it is equally clear that the city council cannot, by arbitrarily defining the business of the trading stamp company as such (i. e., a "gift enterprise"), bring it within the class of inhibited enterprises, and under the guise of the exercise of its police power prohibit the carrying on of that which we have seen is a legitimate business. * * *"

City and County of Denver vs. Frueauff, 39 Col., 20, 38.

"If the decision in that case (*Lansburgh v. Dist. of Col.*) is to be construed as announcing the doctrine that a legislative declaration that a business, lawful in itself, is a 'gift enterprise,' and is thereby rendered unlawful, regardless of the fact that it wholly lacks the essential element of chance, it is at variance with the uniform current of authority. * * *"

Ibid, p. 40.

IN THE FOLLOWING CASES IT WAS SPECIFICALLY DECLARED BY THE COURT THAT THE TERM "GIFT ENTERPRISE" CAN ONLY PROPERLY BE APPLIED TO LOTTERIES AND THAT THE TRADING STAMP BUSINESS IS NOT A "GIFT ENTERPRISE" AS THERE IS IN IT NO ELEMENT OF CHANCE.

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| Ala. | <i>State vs. Shugart</i> , 138 Ala., 86 (1903). |
| Ark. | <i>Humes vs. City of Little Rock</i> , 138 Fed., 292 (1898). |
| Col. | <i>City and County of Denver vs. Frueauff</i> , 39 Col., 20. |
| Hawaii | <i>Ter. of Hawaii vs. Gunst</i> , 18 Hawaii Rep., 196. |
| Md. | <i>Long vs. Maryland</i> , 74 Md., 565 (1891). |
| Mass. | <i>Com. vs. Emerson</i> , 165 Mass., 146. |
| | <i>Com. vs. Sisson</i> , 178 Mass., 578. |
| | <i>O'Keefe vs. Somerville</i> , 190 Mass., 110. |
| N. Y. | <i>People vs. Dycker</i> , 72 App. Div., 308. |
| N. C. | <i>City of Winston and State vs. Beeson</i> , 135 N. C., 271. |

- Penn. Com. vs. Moorhead, 7 Co. Ct. Rep., 315 (Pa. 1890).
 R. I. State vs. Dalton, 22 R. I., 77 (1900).
 Va. Young vs. Com., 101 Va., 853 (1903).

Quotations from the following trading stamp cases conclusively showing that the business carried on by petitioner is not a "gift enterprise."

In *State vs. Shugart*, 139 Ala., 86, the Court in considering a statute prohibiting gift enterprises, under which a prosecution was begun against a trading stamp company, said:

"In *Lohman v. State*, 81 Ind., 17, the Court took judicial notice that the phrase 'gift enterprise' as used in the statute of that state (Indiana) against lotteries, means substantially 'a scheme for the division or distribution of certain articles of property, to be determined by chance, among those who had taken shares in the scheme.' In *Bouvier's Law Dic. (Rawles' Division)*, vol. 1, page 884, the following definition is given: 'Gift enterprise. A scheme for the division or distribution of certain articles of property, to be determined by chance, among those who have taken shares in the scheme. The phrase has attained such a notoriety as to justify courts in taking judicial notice of what is meant and understood'; citing *Lohman v. State*, 81 Ind., 17, and *Meserve v. Andrews*, 106 Mass., 422. The same definition is given in *Black's Law Dic.*, 539, as above. In *Anderson's Law Dic.*, p. 488, the following definition is given: 'A gift enterprise, in common parlance, is a scheme for the division or distribution of certain articles of property to be determined by change, among those who have taken shares in the scheme.' Thus

it will be seen that, to constitute a 'gift enterprise,' such as is denounced by the statute, the element of chance must enter into the scheme. The business or transaction engaged in or carried on by the appellee, is fully set forth in the bill of exceptions, and wholly fails to disclose any element of chance entering into its conduct. Moreover, the bill of exceptions recites that 'no lot or chance was in any wise employed, nor was there any distribution of such articles. The scheme, if such it may be termed, was only a mode of advertising by those merchants who entered into it. The articles of property given away by the company, of which appellee was the manager was not by lot or chance, nor by way of distribution of prizes among share or ticket holders in any chance scheme. We are quite clear that there was nothing in the transaction offensive to the statute against 'lotteries' and 'gift enterprises.'"

In *Humes vs. Little Rock*, 138 Fed., 929, the Court, after describing the trading stamp business, said :

"It will be observed that no element of chance enters into the plan. There are no drawings, no opportunities to win a larger sum upon a wager of any kind. The stamps have the same purchasing power in the hands of everyone, and everyone has the same right of selection among the complainant's stock.
* * *"

In *Young vs. Virginia*, 101 Va., 853, the Court gives a very comprehensive discussion of the legality of the trading stamp business, in the course of which it says :

"In the case at bar the element of chance or lottery is entirely wanting. *There is no uncertainty or indefiniteness about the premiums. The articles are certain and fixed.* They are kept constantly on ex-

hibition so that the person about to collect a book of 990 Stamps has full opportunity to make up his mind what articles he will select from the store of the trading stamp company when he is ready to have his book of stamps redeemed. From the facts certified it appears that the articles for the redemption of stamps are on exhibition at the store of the Company, that the customer who bought the tomatoes and received the stamps knew through the advertisements of the company that the defendant gave the stamps with all cash sales and for that reason purchased from the defendant in preference to some merchant who did not give the stamps ; and that said customer *knew the general value and character of the articles* from which he would be entitled to have his selection in redemption of stamps collected by him. We can find nothing in the contract between the Sperry & Hutchinson Company and the defendant, nor transaction with the the customers in pursuance of such contract that is not a legitimate exercise of one's right to prosecute his business in his own way. As already said, 'it appears to be simply one of the many devices, fallen upon in these days of sharp competition between tradespeople,' to attract customers, or to induce those who have bought once to buy again, and in this respect is as innocent as any other of the many forms of advertising."

One of the leading cases on this subject is *State vs. Dalton*, 22 R. I., 77, where the Court held unconstitutional a statute prohibiting the trading-stamp business. The Court held that the business did not fall within the police power of the State, and said :

"To illustrate again, A buys of B a suit of clothes for twenty dollars and receives a check or

stamp, which entitles him to receive from C a pair of shoes, worth \$2.00, a hat worth \$2.00, or a pair of gloves worth \$2.00. It is true that A has not seen these articles at the time of purchasing the clothes, but as he knows that he is to receive one of the articles mentioned, as he may elect. We cannot see that there is anything so uncertain about the transaction as to appeal to the gambling instinct. At any rate, it does not, in any real sense partake of the nature of a lottery. It is simply one of the infinite variety of devices which are resorted to by tradespeople in these days of sharp competition, to promote the sale of their goods."

In *People vs. Dycker*, 72 App. Div., 308 (N. Y.), in holding a statute unconstitutional which prohibited the giving of trading stamps, the Court says :

" It appears that in the conduct of the trading stamp business of said company, the articles of value to be exchanged for a book of stamps are exhibited continuously and openly in the store occupied by said company. Nothing of value is required from the person presenting the book of coupons and nothing is required by the company from the collectors, except that they shall obtain the stamps in connection with cash purchases of goods. The articles to be exchanged for the stamps are *certain and fixed and only subject to the choice of the collector of the book of stamps.* * * * This record does not disclose any element of chance in the transaction. Even the possibility of some of the stamps never being offered for redemption is largely eliminated by there being no time or boundary limit to the collection of the stamps, and nothing in the arrangement preventing holders of small lots of stamps from com-

bining with others to make a sufficient number of redemption. The transaction is not a species of lottery, and does not appeal to the gambling instinct" (People v. Gillson, 109 N. Y., 389; Commonwealth v. Sisson, 178 Mass., 578; *Ex parte McKenna*, 126 Cal., 429; State v. Dalton (R. I., 48 L. R. A., 775).

In *City & County of Denver vs. Frueauff*, the County Court held unconstitutional an ordinance defining a gift enterprise to be the selling or distributing of trading stamps entitling the purchaser of property to receive from any person other than the vendor any article other than that sold to the purchaser. Petitioner's Company was the real defendant in that case. It will thus be seen that this case is practically on all fours with the case at bar.

The Court said :

" * * * on investigation of all the authorities it appears to be absolutely clear that the term 'gift enterprise' used in the constitution is practically synonymous in meaning with the word 'lottery,' and is intended to describe a scheme involving the giving away of tickets, or distribution of prizes by lot or chance. I do not consider that the rather ingenuous and able attempts of counsel for the city to strengthen their cases by this peculiar language of our constitution can in the slightest way make the case at bar in this respect any different from the numerous other cases forbidding any legislative restriction of the green trading stamp business.
* * *"

" ' Counsel for the city seem to recognize this in the very able brief they have filed, because the only argument that could possibly appeal to the court is the one in which an attempt is made to show that

the business of the Sperry & Hutchinson Company involves those elements of chance akin to lotteries or gaming. If this could be successfully maintained then, and then only, would this case come within the inhibition of the constitution of the State against the legislature permitting either lotteries or gift enterprises. No doubt the same arguments have been made in the other numerous cases involving this green trading stamp business, but which arguments have not been accepted by the courts as sound. Neither do I think they are sound in this case, nor do they tend to bring this business within the real element of chance which the authorities have recognized as being that particular element of chance which constitutes gambling. When it comes to the mere element of chance, there is hardly a business, or anything in life, that does not involve some element of chance; and in considering this question we must necessarily distinguish those ordinary elements of chance which are legitimate in any business and those which because of directly encouraging or involving the gambling spirit are illegitimate. * * *

One of these tickets or coupons called green trading stamps is of value if the conditions are complied with. The person receiving them may or may not comply with those conditions as he sees fit; if he does he is entitled to something of value. The stamp, therefore, to that extent, is of value when certain conditions which are strictly legitimate, to my mind, are complied with. Supposing a newspaper should offer for five subscriptions a prize, and an individual encouraged by the offer should patronize the paper to the extent of obtaining three subscriptions; he turns them in and receives a receipt for three subscriptions, and may be given the prize or gift of value upon obtaining the two addi-

tional subscriptions, which with the receipt for the three already obtained would entitle him to the gift of value. While there would be a chance that the person who thus obtained three subscriptions might never receive the prize because he might not get the two additional subscriptions, it would certainly not come within the definition of chance as applied to lotteries or gambling. I do not conceive that there is anything contrary to public morals or involving the element of chance which may constitute gambling if a merchant should see fit to give something of value for every ten dollar purchase in his store, and in order to hold the customer should give him a receipt for every purchase, which should be evidence when presented of the amount required to be purchased to entitle him to the gift. A banker may loan money to an individual upon his note. The piece of paper called the note is of itself of no value. It is merely evidence of the right of the banker to collect of the maker a certain amount at a certain time. There is a chance that the maker may never pay the note. Yet the transaction is perfectly legitimate, and no one, it seems to me, unless for the lack of a better argument would contend that the transaction was void because of the chance that the note might never be paid. * * *

After reading the decisions of our own appellate courts, as well as those of the most learned courts in the country, this court cannot consider for a moment the argument that the city council has the exclusive right to declare what is a gift enterprise. These courts have all held differently, and I cannot well understand the decision in the District of Columbia case in which it is stated substantially that the entire question as to whether or not an ordinance or statute like the one in question was within the

police power, or as to whether the particular business legislated against was a gift enterprise, was disposed of by the mere declaration to that effect of the legislative body in the prohibitory act. This is certainly contrary to the great weight of authority and the repeated declarations of the Supreme Court of the United States and of the State of Colorado. Such definitions are subject to review by the courts as to whether or not when making the same the legislative body has acted within its power and prerogatives as limited by the constitution. The test of this limit is to be found in the definition of the police power which may be exercised by legislative bodies in regulating the conduct of business of others. They can only do so where the business regulated interferes with the public health, public morality or public safety. It cannot be for a moment contended in this case that this business interferes with any of these things unless it be with the public morality, and it would only interfere with the public morality in case it can be successfully shown that the business involves those elements of chance involved in lotteries and gambling. As I said before, I cannot see any such element of chance in this business and if there be no such element in it, it cannot possibly interfere with public morals, and if it does not, the city council has no power from any source to prohibit it. If this were not true there would be no safeguards to the liberty of the citizen or his right to engage in lawful enterprises, or bring about a wholesome competition in business that tends rather to the public necessity than to the contrary."

The decision of the County Court in the Frueauff case was affirmed in 39 Col., 20, in a long and admirable opinion,

which sets forth the Petitioner's business. By the constitution of Colorado "lotteries and gift enterprises" were prohibited, and referring to this, the Court said (p. 38):

"It is contended that these provisions are broad enough to include 'gift enterprises' of any nature, whether they involve the element of chance or not, and, therefore, justify the adoption of the ordinance in dispute. We do not think the term 'gift enterprise,' as used in the foregoing provisions, is susceptible of this construction. Associated as these words are in both constitution and statute with the word 'lottery' they involve, as that term does, the element of chance or hazard, and necessarily mean that character of 'enterprises' which appeals to the gambling instinct, and tends to debauch public morals. This being so, there is no warrant for saying that the transaction sought to be prohibited by the ordinance under consideration comes within the category of 'gift enterprises' contemplated by the constitution or statute. * * *"

In *Long vs. State*, 74 Md., 565, the Court held unconstitutional a statute which prohibited "holding out as an inducement for any such barter, sale or trade * * * any scheme or device by way of gift enterprises of any kind or character whatsoever."

The Court said the statute

"by reason of its general terms, including as it does all gift enterprises, thus involving the element of chance, as well as those that do not, is invalid so far as it relates to gift enterprises not involving chance."

In *City of Winston vs. Beeson*, 135 N. C., 271, the Court

held Petitioner's business was not a "gift enterprise," and in the course of a clear and positive opinion said :

" We prefer to conclude that the purpose was not to impose a tax upon a perfectly innocent and harmless business, and to place it in the same class and category with lotteries which have fallen under the ban of an enlightened public sentiment and under the condemnation of the law, but to tax such 'enterprises' as partake of the nature of lotteries, and hold out temptations and allurements to the unwary and credulous, or to those who are willing always to take chances on results, in the hope of getting a great deal for a very little.

" Having reached the conclusion that the words 'gift enterprise' as used in the charter refers only to such a one as includes the element of chance, we must next inquire whether the business of the defendant company comes within the meaning of those words as thus construed. * * * The right to have the stamps redeemed depends upon no contingency, chance or lot whatsoever ; the person receiving the stamps upon the purchase of goods is not in any degree deprived of his choice or will. Indeed by the contract he is given full and free exercise of his choice and will. The right of selection among the articles kept by the stamp company in its store is expressly given, and the stamp collector may choose the best or the most valuable or such a one as may be most useful to him or pleasing to his taste, as he may be minded. The articles are all publicly exhibited, and before the purchases are made or stamps collected any person proposing to buy and to receive the stamps from the merchant has free access to the store, where he may see and examine the goods from which his selection may be made.

There is therefore no uncertainty as to the nature, character or value of the premium, if we may so call it, with which the stamps will be redeemed. The fact that the stamps are redeemed at a place other than the one where they are issued certainly does not introduce into the scheme any element of chance. We can discern no practical difference between this arrangement between the parties and one by which the merchant agrees to discount his bills where cash is paid by his customer at the time of the purchase, and the giving of stamps redeemable at a store of another in goods to be selected by the holder instead of an actual discount by the merchant does not in law vary the case or change the real and substantial character of the transaction."

POINT IV.

The Cases of Lansburgh, Kraft and Gregory in the Court of Appeals, D. C., should not be followed.

In support of the Statute under consideration our adversaries rely upon the case of *Lansburgh vs. District of Columbia*, 11 App. (D. C.), 572, and also upon the opinion of the Court of Appeals, in the case of *District of Columbia vs. William B. Kraft*, decided by that Court in April, 1910, but we respectfully submit that those cases are in direct conflict with the law of the land, and with the great weight of authority. For that reason they should have no weight with this learned Court.

In the Kraft case, the learned Court of Appeals practically reiterated its conclusions in the Landsburgh case, and followed it closely; so that we shall confine our attention to the Landsburgh case.

The Court of Appeals in the Kraft case admits that only one decision (93 Fed. Rep., 857) has followed the Landsburgh case (Petition, p. 47) whilst it is a fact that in another division of the same Federal District an opposite conclusion was reached (138 Fed. Rep., 929).

The Landsburgh decision practically stands alone and should receive but little consideration.

At the outset of our discussion of that case we call the Court's attention to the fact that that decision was based largely upon matters which were not in the record and therefore not before the Court, but were the result, in the main, of speculation. Whilst holding the defendant guilty of conducting a "gift enterprise," the Court found that the transaction did not involve any question of chance or lottery or any moral turpitude whatsoever. With the risk of tiring the patience of the Court, we shall take the liberty of discussing several of the leading features of that case.

In addition to passing over *Long vs. State*, *People vs. Gillson*, *Com. vs. Emerson* and other similar authorities in a rough-shod sort of way, the opinion indulges in so many extravagant statements, so much speculation, and so much surmise, none of which appears to be justified by the record, that it takes away from the case the idea that it is the product of calm, judicial consideration, and impresses it with a character quite the opposite. In this respect it stands out in striking contrast to *Long vs. State*, *People vs. Gillson*, *State vs. Dalton*, and other similar authorities which are logical, forceful, and are discussed in a thoroughly dispassionate way.

We trust that in making these observations it will be understood that we do so out of no disrespect whatsoever to the learned Court of Appeals, but purely and simply as

the result of a conclusion which has irresistibly forced itself upon us after a very careful study of every feature of that decision.

I. The Court at page 531, says that it is :

“ one of the most shrewdly planned of the many devices to obtain something for nothing.”

Not only is this expression extravagant, but it is purely speculative.

The record in the case showed that there was a contract between the Trading Stamp Company and one of its subscribers, wherein the Trading Stamp Company undertook to advertise the business of its subscriber by printing his name, business and address in its subscription books and distributing those books among 100,000 persons in the community ; to furnish premiums to his customers, and the means by which those premiums could be secured, viz. : trading stamps ; to establish a store in the community where these premiums could be inspected and selected, and in every way, to promote the business of its subscribers. It must be assumed that it did all of these things, for there is nothing to the contrary in the record. For these services the subscribers agreed to pay in the manner set forth in the contract.

With such facts before the Court, how could it have been fairly contended that the Trading Stamp Company was “ receiving something for nothing ” ? It must be assumed that the subscriber deemed the services which were to be rendered to him as valuable to him ; it must be assumed that he regarded such services as beneficial to his business ; it must be assumed that the services which were to be rendered would tend in some wise to promote his business and his interests ; it must be assumed that the subscriber did not make a contract which he considered an improvident one. In other words, he must have thought that he was receiving some benefit. It is immaterial how large a ben-

effit he was receiving, although, to have placed the subscriber's name prominently before 100,000 persons must have proven of some value to him, even if nothing else had been done under the contract. So that we can safely say we think that this declaration on the part of the Court was not justified.

II. The Court, at page 581, says :

" They are not merchants engaged in business, as that term is understood ; they are not dealers in ordinary merchandise engaged in a legitimate attempt to obtain purchasers for their goods by offering a fair inducement ; their business is the exploitation of nothing more than a cunning device."

Here, again, we have great extravagance of expression. If the Trading Stamp Company did all that it undertook in its contract to do (and we must assume that it did, as the record shows nothing to the contrary), it was engaged in an advertising business pure and simple, a fair business, a lawful business. To advertise the business of its subscribers, to furnish premiums to their customers and to open a store or stores in their community for the purpose of furnishing said premiums required large outlays on the part of the Stamp Company for such advertising and the distribution of the advertising matter, and for the purchase of premiums and the maintenance of its stores. It was an important and useful factor, both in the commercial and mercantile world ; and to say that its business was nothing more than " the exploitation of a cunning device " was to say the least, unfair. It is not alone in the sale of goods at a profit which makes one a merchant or a useful member of the commercial world. We assume that a large purchaser of merchandise is as important to the business life of a community as a large seller of merchandise. Nor does all of the good of a community come from its mer-

chants alone. There are any number of other trades, callings and professions which are equally worthy of consideration. This Company was one of them. It undertook to advertise merchants in a very liberal and an extensive way.

III. The Court on this same page, says :

“ With no stock in trade but that device and the necessary books and stamps and so-called premiums with which to operate successfully, they have intervened in the legitimate business carried on in the District of Columbia between the seller and buyer, not for the advantage of either, but to prey upon both.”

It seems to us that a more unjust characterization could not be contemplated than this. It also seems to us that the Court must have overlooked the facts which were before it. It must have overlooked the responsibilities which the Trading Stamp Company had assumed under its contract ; its obligations to the parties with whom it contracted ; the fact that the Trading Stamp Company maintained and operated a store in the community and carried in said store a large and valuable stock of premiums (over 1,000) and not what the Court is pleased to call “so-called premiums ;” that to advertise the business of its subscribers among 100,000 persons was no trifle. All these facts appear in the record and must have been thrust aside by the Court in reaching its conclusions.

In view of these facts how was it possible for the Court to say that the Trading Stamp Company “preyed” upon its subscribers and that the services rendered by it were not to the “advantage” of its subscribers. As we have heretofore stated, it must be assumed that the merchant in making the contract with the Trading Stamp Company must have felt that he was getting

value received; otherwise he would not have made the contract. To argue as the Court does that these stamps were "forced upon a perhaps unwilling merchant" is speculation pure and simple, for the record shows no such fact, nor does the record show that either "*force or fear*" enters into the transaction or indeed that the merchant is in any sense "unwilling." Nor can these things by any fair inference be gathered from the record. But even if it were true, that the merchant enters into this contract with the *hope* of obtaining the customers of another, or through the *fear* of losing his own, that should not be the subject of condemnation. Every merchant advertises his business with the same object in view; every merchant adopts means to increase his business with the same hope and the same fear; every merchant adopts attractive and frequently very expensive methods of advertising and conducting business because of his desire to draw new trade and new customers and to keep those which he already has. It might just as well be contended that business men are forced by the newspapers to contract with them for advertising because they fear that they will lose their trade unless they do.

The declaration of the Court that the Trading Stamp Company did nothing "of advantage" for the collector of the stamps and "preyed" upon him, is equally unjust, because the facts showed in the plainest way that the customer gave absolutely nothing for the stamps, but that he had the right to receive a premium of substantial value. How, then, did the Trading Stamp Company "prey" upon the collector of the stamps? To argue as the Court does that the costs of the premiums will sooner or later fall upon the customer is purely speculative and is not justified by the facts, for it does not appear that he would charge any more to his customers to whom he gave these stamps than the regular price therefor. Moreover, we feel absolutely no fear of contradiction when we say that there is no merchant who adds to his price when he receives cash, but they are always

willing to make a reduction when paid in cash. Hence there is no ground for the assertion of the Court that the customer will eventually pay the price of the premiums.

IV. The Court again on page 531, remarks :

“ A limited number only (an apparently necessary feature of the scheme) are included in the list for the distribution of stamps, and other merchants and dealers who cannot enter, must run the risk of losing their trade or else devise some other scheme to counteract the adverse agency ”.

When, may we ask, did it become a crime or a wrong for one merchant to use a scheme or device for advertising his business which was not open to everybody else, and which forced everybody else to seek some other scheme to counteract the adverse agency ? Has it not ever been so ? Is it not true everywhere that one merchant has an advantage over another in the method of advertising his business, and that the one who possesses greater facilities, survives, and the one who possesses the lesser, fails ? But certainly it cannot be seriously argued that a plan of advertising which contemplates these things is for that reason unlawful. If such were true, the enterprising, merchant would be placed upon the level of the drone in mercantile life. The law looks with favor upon the diligent, active, progressive force in a community ; and if one merchant fails to survive because his neighbor has hit upon something which increases his business, it is one of those inevitable things which the law can never control.

V. Again, at page 531, the Court indulges in pure speculation when it declares that

“ The stamps are sold for 50 cents a hundred and purport to be redeemable with premium gifts at the assumed value of \$1.00 per hundred.”

There is absolutely nothing in the record which justifies any such statement. If it were true, the Trading Stamp Company could not live one day. The Court might very well argue from such a condition of things that the scheme could not long survive. But even were the Court right in this conclusion, that would furnish no just reason for calling this business a lottery ; for as was said in *People vs. Gillson* (*supra*), p. 405, that

“ a man engaging in trade will not for any length of time continue to sell an article below what it cost him to procure it is a safe assumption, while it is equally safe to say that he may do so for a time long enough to enable him to introduce his article to the notice of the public and create a demand for it which he will make a profit by supplying ; or he may make a profit by supplying one article which will amount to enough to enable him to give away some other article with it and permit him to receive the average rate of profit in the business which he is engaged in. To prevent this by legislative action does not reasonably or fairly tend to prevent fraud or deception in the sale of articles of food.”

VI. The Court at page 532, says :

“ If this premium should have any fair value, then the Stamp Company must inevitably rely upon the failure of the presentation of tickets for redemption.”

Why inevitably ? Of course on the assumption that the Trading Stamp Company gives away more than it receives in the way of premiums, it might be so argued ; but there is nothing in the record which justifies any such assumption, nor which justifies the assumption that the Trading Stamp Company in any sense relies upon the failure of the pre-

sentation of tickets for redemption. But assuming that it did rely upon the failure to present the stamps for its method of earning a profit, would there be anything wrong in that ?

The United States government is engaged in issuing paper money, which are drafts drawn upon itself, payable in coin. Paper money is not of real value, but only represents the real money in the mint. Every time paper money is burned the government is so much the gainer. The government also issues postage stamps for cash, many of which are never used, and the government profits to that extent.

Persons who insure their lives or pay premiums under the installment plan, frequently cease to continue their payments before the insurance companies are called upon to make good their policy ; and although the insurance companies gain by such lapses, they are not engaged in an illegal business.

Railroads and street car companies sell tickets which are never presented. Checks, warehouse receipts, and other evidences of right to cash or property, are lost, strayed or stolen, but the fact that they are never presented does not make the issue thereof subject to criticism.

Depositors in banks whose money draws interest only when left a certain time on deposit, withdraw prior to such time and lose the interest, but the banks are not criticised for such gains. The reason is perfectly plain and should be a sufficient answer to this class of argument. It is that the holder of these vouchers has a right to present them for redemption, and if he fails to do so it is his own loss.

Assessment associations depend as much upon so-called " lapses " for their earnings as upon any other method in their business, and yet at no time have such associations been deemed unlawful because they depend upon lapses for the purpose of earning their profits. Nor does such a plan involve, as the Courts have found, any species of lottery or gambling transaction. In the case at bar every stamp is separately redeemable, so that if lapses occur it is the fault

of the holder and not of the Company, which stands ready to redeem each stamp presented.

Winston vs. Beeson, 135 N. C., 271.

Such extravagant and gratuitous expressions as we have quoted from the Lansburgh case might very well be expected of an advocate, but certainly they do not bear upon their face the impress of calm, judicial consideration.

VII. As to redemption by third parties.

Apparently one of the reasons that led the Court in the Lansburgh and Kraft cases to reach the conclusions therein set forth, was that the Trading Stamp Company interfered between a merchant and his customers as a middleman. This is a matter for commercial, rather than legal, consideration ; but in passing it may be said that if the arguments is sound in any sense, it would mean the elimination of every middleman and broker engaged in business. Probably one-half of the business world is composed of middlemen of one sort or another. That the defendant is not altogether a middleman is shown by the facts before the Court, it gives both to merchants and customers value received. To merchants it gives advertising, and to customers it furnishes a specific and certain value in return for cash purchases.

It seems to be admitted by every Court that the axiom *qui facit per alium facit per se*, applies with full force to the giving of Trading Stamps by a merchant for redemption by a third party. The Courts have uniformly held unconstitutional statutes which prohibited the giving of Trading Stamps by a merchant to be redeemed by a third party, while allowing the giving of Stamps by a merchant redeemable by himself.

See the following cases :

People vs. Dycker, 72 App. Div., 308 (N. Y.).

People vs. Zimmerman, 102 App. Div., 103 (N. Y.).

State vs. Walker, 105 La., 492.

State vs. Dalton, 22 R. I., 77.

State vs. Dodge, 76 Vt., 197.

Young vs. Va., 101 Va., 853.

“* * * If the seller, by arrangement with a responsible company, secures the performance of the agreement, and the arrangement is satisfactory to the buyer, it would see that such a plan ought not to be made a crime, while redemption by the merchant is deemed an honest transaction. The statute is not founded on the moral plane pretended but belongs to that class of legislation designed to drive out of business a successful competitor. * * *”

People vs. Zimmerman, 102 App. Div., 103.

In *State vs. Walker*, 105 La., 492, a similar act was held unconstitutional for the same reason.

See also *State vs. Dalton*, 22 R. I., 77, where the Court said :

“It is to be observed that the act does not prohibit the vendor himself from giving or ‘throwing in,’ as it is sometimes termed in common parlance, some other article in addition to that sold, but only prohibits the seller from giving anything in the nature of a check or order upon some other person which shall entitle the holder thereof to obtain from some other person some article of merchandise, in addition to the thing sold. In other words, the act recognizes the right of a person to give away an article of merchandise in connection with and as an inducement to the making of a sale of some other article, but provided, in effect, that the giving of such additional article must be done by him directly, and not through a third person. We fail to see that

there is any substantial difference in principle between the two methods, or that either bears resemblance to a lottery.

"The thing sought to be accomplished by the vendor is the sale of his goods by means of the inducement held out to the purchaser in the form of a premium; and if he may himself give and deliver the premium, as he clearly may, he may also give it through a third party.

"For, as already intimated, it can make no possible difference that the article given away with the sale is delivered to the purchaser by a third person instead of the seller himself. We think it is clear that such a prohibition is an unwarranted interference with the individual liberty which is guaranteed to every citizen both of our State Constitution and also by the Fourteenth Amendment to the Constitution of the United States."

In *People vs. Dycker*, 72 App. Div., 308, the Court said :

"The prohibitive part of Section 335a aims at the practice of issuing trading stamps that are to be redeemed by any person other than the merchant who distributes them or the manufacturer of the packages of goods sold. Just what there is in the thing prohibited, differing from the thing expressly authorized that makes it inimical to the public welfare and general safety does not appear."

In *State vs. Dodge*, 76 Vt., 197, the Court said of the Act in question there :

"It only prohibits the seller of the property from giving a stamp or coupon which entitled the purchaser to demand and receive property from the

third party, and the delivery of goods, wares and merchandise, upon such stamps or coupons. The seller is still at liberty to give such stamps or coupons redeemable by himself in property and, payable in cash, by a third party. In principle there is no substantial difference in the two methods. They both accomplish the same results, and in neither method is there an element of chance. The act, in effect, makes it lawful for a merchant to give a trade stamp redeemable by himself in cash or merchandise, and by a third party in cash, and it makes it unlawful for him, under like circumstances and conditions, to give the purchaser a trade stamp which is redeemable in some well defined article by another merchant. This is equivalent to declaring that a man shall not give another article, for it can make no possible difference that the article given with the sale is delivered to the purchaser by a third party instead of the seller himself."

In *Young vs. Virginia*, 101 Va., 853, it is said :

"It is further contended by the defendant that the act is unconstitutional because it deprives him of the equal protection of the law. That comparison of Sections 1 and 2 of the act shows that it gives to one of its citizens, a manufacturer, the right to use tickets, stamps or coupons, while it denies to another of its citizens the same privilege ; and that it gives to a merchant the right to make a gift to his customer, provided he does so personally, while it denies to another merchant the right to make a sale of his products and to accompany it with a ticket, stamp or order entitling his customer to receive from a third person a gift or gratuity for which the merchant had contracted. The statute is, therefore, un-

equal in its operation and purpose, because it does not give to all classes of merchants the same protection and rights under the law."

IN THE FOLLOWING CASES THE CASE OF LANSBURGH VS. THE DISTRICT OF COLUMBIA, 11 DIST. OF COL., APP. 512, WAS REFERRED TO AND EITHER DISREGARDED OR EXPRESSLY OVERRULED :

- Ala. State vs. Shugart, 138 Ala., 86 (1903).
- Ala. City Council of Montgomery vs. Kelly, 38 So. Rep., 6, 7.
- Ark. Humes vs. City of Little Rock, 138 Fed., 929.
- Cal. *Ex parte* Drexel & Holland, 147 Cal., 763 ('05).
- Col. City and County of Denver vs. Frueauff, 39 Col., 20.
- Ga. Hewin, *et al.*, vs. City of Atlanta, 121 Ga., 731.
- Hawaii Ter. of Hawaii vs. Gunst, 18 Hawaii Rep., 196.
- Minn. State of Minn. *ex rel.* Att'y. Gen'l. vs. The S. & H. Co., 126 N. W. Rep., 120 (April, 1910).
- N. H. State vs. Ramseyer, 73 N. H., 31 (1904).
- N. C. City of Winston vs. Beeson, 135 N. C., 271.
- R. I. State vs. Dalton, 22 R. I., 77 (1900).
- Wash. Leonard vs. Bassindale, 46 Wash., 301.

POINT V.

The Act of Congress under consideration is unconstitutional ; the District Court therefore had no jurisdiction ; its judgment and sentence is void, and the Petitioner should be discharged.

Respectfully submitted,
JOHN HALL JONES,
New York City, N. Y.,
Attorney for Petitioner.

W. BENTON CRISP,
JOHN HALL JONES,
Of Counsel.



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JAMES H. McTIGUE

IN SEN

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1870.

Original, No. 17.

EX PARTE WALTER A. GREGORY, PETITIONER.

ANSWER OF THOMAS E. HENNE, WARDEN OF
THE JAIL OF THE DISTRICT OF COLUMBIA,
TO THE RULE TO SHOW CAUSE WHY THE
WRIT OF HABEAS CORPUS SHOULD NOT BE
GRANTED TO THE PETITIONER.

EDWARD H. THOMAS,

Corporation Counsel, D. C.

WILLIAM HENRY WHITE,

Assistant Corporation Counsel, D. C.

Attorneys for Respondent.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

Original, No. 17.

EX PARTE WALTER J. GREGORY, PETITIONER.

To the Honorable the Supreme Court of the United States:

The answer of Thomas H. McKee, warden of the jail of the District of Columbia, to the rule to show cause why the writ of *habeas corpus* may not be granted, commanding this respondent as warden aforesaid to produce the petitioner before this honorable court, respectfully shows to the court:

This respondent is advised and therefore avers that the police court of the District of Columbia at the times hereinafter mentioned was and is a court created and established in the District of Columbia by virtue of certain acts of Congress, with original jurisdiction of crimes and offenses as set forth in subchapter two of an act to establish a code of law for the District of Columbia, approved March 3, 1901, on information by the proper prosecuting officer, which said jurisdiction then and there extended and comprised violations of the provisions of the act of Congress entitled "An act prohibiting gift enterprises in the District of Colum-

bia," approved February 17, 1873 (17 Statutes at Large, page 464), as incorporated in sections 1176 and 1177 of the Revised Statutes of the United States relating to the District of Columbia; that in the December term, A. D. 1909, the District of Columbia, a municipal corporation duly organized and constituted by virtue of certain acts of Congress, by its officer and assistant corporation counsel duly appointed and authorized, proceeded in said court by information on oath against the petitioner, Walter J. Gregory, as follows, to wit:

"In the Police Court of the District of Columbia,
December Term, A. D. 1910.

THE DISTRICT OF COLUMBIA, ss:

James L. Pugh, Jr., Esq., assistant corporation counsel, who for the District of Columbia prosecutes in this behalf in his proper person, comes here into court, and causes the court to be informed, and complains that Walter J. Gregory, late of the District aforesaid, on the first day of November in the year A. D. nineteen hundred and nine, and on divers other days and times between the said first day of November and the twentieth day of December in the year nineteen hundred and nine, in the city of Washington and in the District of Columbia aforesaid, did engage in the business of a gift enterprise; contrary to and in violation of sec. 1177 of the Revised Statutes relating to the District of Columbia, and constituting a law of the District of Columbia.

JAMES L. PUGH, JR.,
Assistant Corporation Counsel.

Personally appeared J. E. Armstrong, this 28th day of December, A. D. 1909, and made oath before

me that the facts set forth in the foregoing information are true.

[SEAL.]

J. B. PEYTON,
*Deputy Clerk Police Court of the
District of Columbia."*

That the said court then and there had jurisdiction of the offense as charged in said information, to wit, of conducting a gift enterprise in the District of Columbia, and of the person of the petitioner Walter J. Gregory, and (so respondent is advised and therefore avers) authority to render the judgment hereinafter mentioned against petitioner.

Your respondent is informed and believes and therefore avers that, to wit, on the third day of November, 1910, the said petitioner, Walter J. Gregory, appeared in said court and was arraigned and entered his plea of not guilty to said information and requested that he be tried by the judge presiding in said court; that thereupon, to wit, on November 5, 1910, counsel for the said Walter J. Gregory and the District of Columbia filed the following stipulation in said court, to wit:

"In the Police Court of the District of Columbia,
December Term, 1909.

No. 348,901.

DISTRICT OF COLUMBIA

vs.

WALTER J. GREGORY.

Information for Violating Law Relating to Gift
Enterprises.

The defendant, Walter J. Gregory, having in open court admitted the truth of all of the statements con-

tained on the agreed statement of facts, heretofore filed herein, it is this third day of November, 1910, agreed and stipulated by and between the defendant, by his attorney, and the District of Columbia, by its attorney, that the case shall be submitted to the judge presiding in said court upon said agreed statement of facts.

A. S. WORTHINGTON,
Attorney for Defendant.
 EDWARD H. THOMAS,
Corporation Counsel and Attorney
for the District of Columbia."

This respondent is informed and believes and therefore avers that a copy of the said agreed statement of facts is contained in the petition of said Walter J. Gregory filed in this cause commencing near the bottom of page 12 thereof and ending on page 28 thereof, and that at the time the petitioner was arraigned and after his plea of not guilty, the case was submitted to the court on said statement of facts theretofore filed in said court, which statement the petitioner in open court admitted to be true.

This respondent is informed and believes and therefore avers that thereupon on the 7th day of November, 1910, the said petitioner and his counsel being present in open court the said police court adjudged the said Walter J. Gregory guilty of the offense charged in said information and sentenced him to pay a fine of one hundred (\$100.00) dollars and in default of the payment thereof to be imprisoned in the District jail for 150 days; that thereupon the said Walter J. Gregory refused to pay the said fine and was therefore and thereupon committed to the custody of this respondent, the warden of the jail of the District of Columbia, by the said police court by its commitment under its seal. This respondent says that under and by virtue of the authority

of the commitment of said court your respondent received the person of the said Walter J. Gregory and him confined from about 12:00 o'clock m. on the 7th day of November, 1910, in said jail and held him therein until about 2:00 o'clock p. m. on the 8th day of November, 1910, which said commitment reads as follows:

"In the Police Court of the District of Columbia.

DISTRICT OF COLUMBIA,

County of Washington, To wit:

To the Warden of the Jail of the District of Columbia:

Receive into your custody the body of Walter J. Gregory, herewith sent by the police court, brought before said court charged upon oath with violation of the law relating to gift enterprise; and being convicted and sentenced to pay a fine of one hundred dollars, and in default to be imprisoned one hundred and fifty (150) days in jail; and being in default, him therefore safely keep in your said custody until he shall be discharged by due course of law; and for so doing this shall be your sufficient warrant.

Witness the Hon. James L. Pugh and the Hon. Alexander R. Mulloony, judges of the police court of the District of Columbia, and seal of said court this seventh day of November, in the year of our Lord one thousand nine hundred and ten.

[COURT SEAL.]

N. C. HARPER,

Deputy Clerk Police Court, D. C."

That this honorable court by its order passed November 8, 1910, directed that said Gregory be released from custody on giving bond in the sum of fifteen hundred (\$1500.00)

dollars, to be approved by the clerk of this court, and that said bail was given on said 8th day of November, 1910, and upon the authority of said order your respondent released said petitioner from said confinement and discharged him from custody.

Your respondent is informed and believes and therefore avers that no exception was taken to the ruling of said court in adjudging the said petitioner guilty of the offense of conducting a gift enterprise, nor was any notice given for or on behalf of petitioner of intention to apply to the Court of Appeals of the District of Columbia for a writ of error, nor was any bill of exceptions reserved, settled, signed or sealed in respect to the said judgment and sentence of said court. Respondent is advised and therefore avers that the said judgment and sentence of said court is final and conclusive, and that it is not subject to collateral attack and is valid. Respondent is informed and believes that the said judgment is in full force and effect and remains unreversed and unsatisfied.

And having fully answered said rule to show cause this respondent prays to be hence dismissed with his costs, and that the petitioner may be remanded to his custody in accordance with the said commitment of said police court.

THOMAS H. MCKEE,

Warden of the Jail of the District of Columbia.

EDWARD H. THOMAS,

Corporation Counsel of the District of Columbia.

WILLIAM HENRY WHITE,

Assistant Corporation Counsel of the

District of Columbia, Attorneys for Respondent.

DISTRICT OF COLUMBIA, ss:

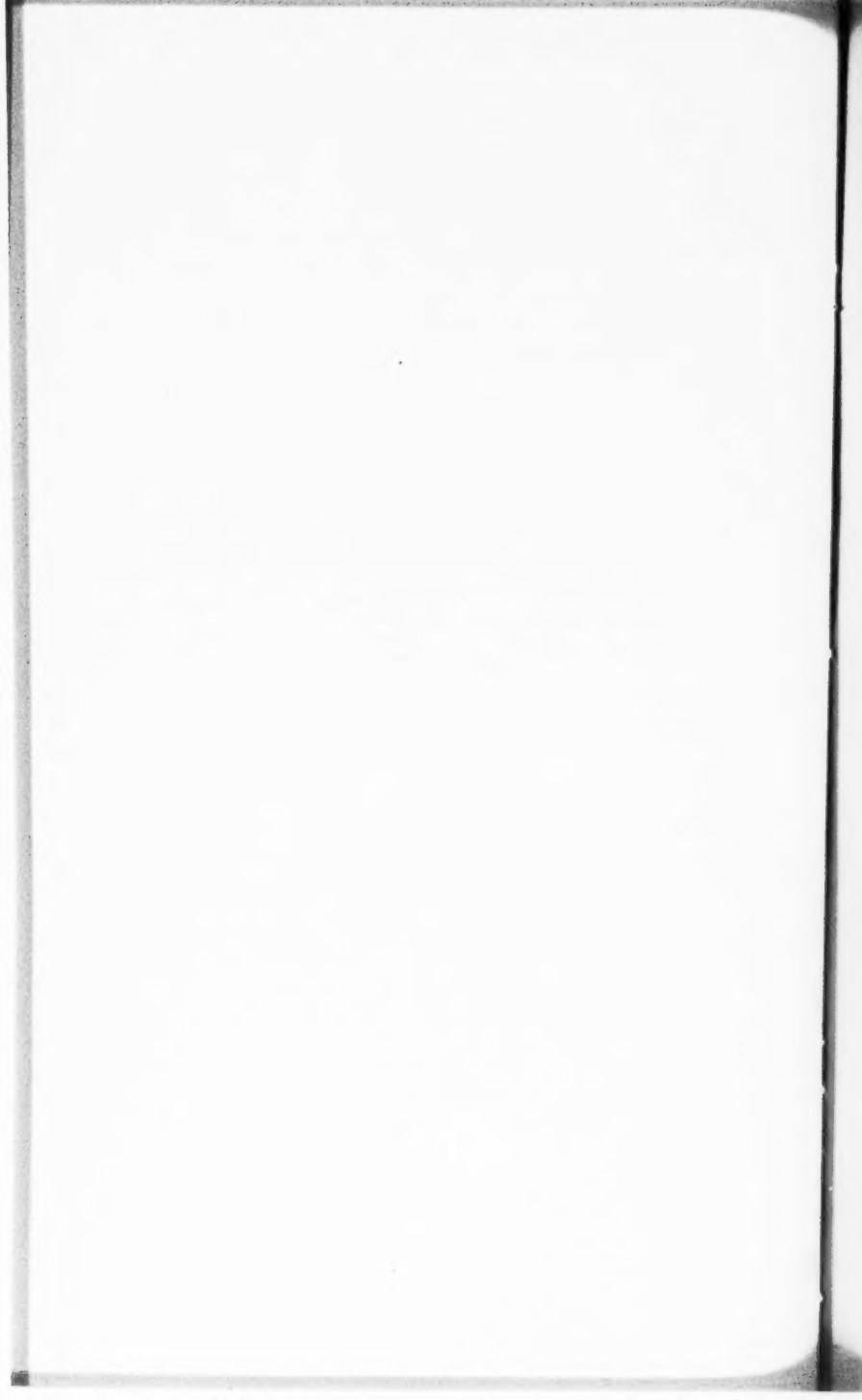
I, Thomas H. McKee, on oath, say that I am the warden of the jail of the District of Columbia; that I have read the above answer to the rule to show cause issued in the above-entitled cause; and that the matters therein stated as of my personal knowledge are true, and the matters therein stated on information and belief I believe to be true.

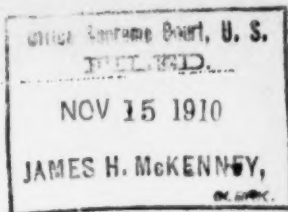
THOMAS H. MCKEE.

Subscribed and sworn to before me this 25th day of November, A. D. 1910.

[NOTARIAL SEAL.]

JAMES F. SMITH,
Notary Public, D. C.





**IN THE
SUPREME COURT OF THE UNITED STATES.**

OCTOBER TERM, 1910.

Original, No. 17.

IN RE WALTER J. GREGORY, PETITIONER.

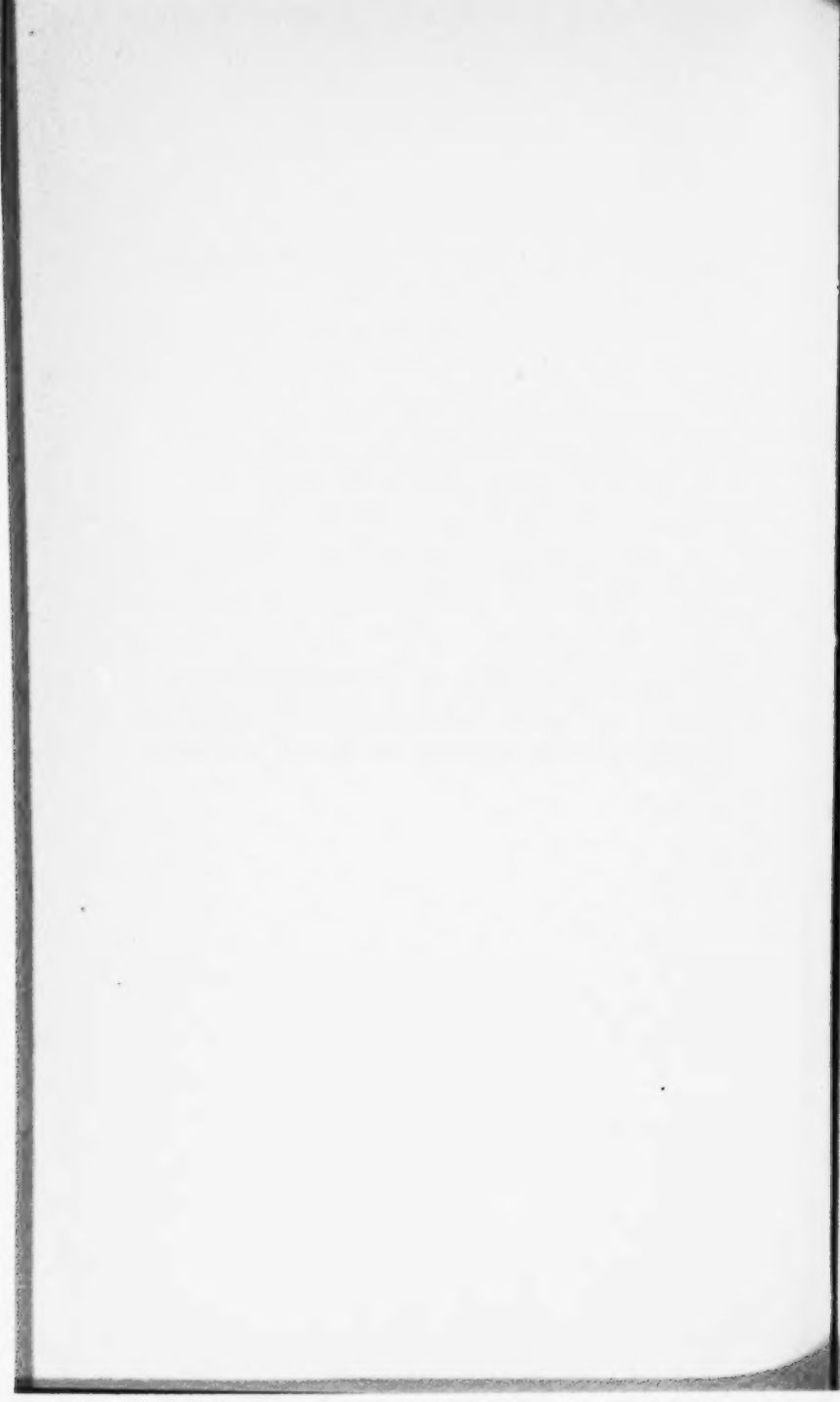
**BRIEF IN OPPOSITION TO APPLICATION FOR
LEAVE TO FILE PETITION FOR HABEAS
CORPUS, AND OF MOTION TO ADMIT TO BAIL.**

E. H. THOMAS,

Corporation Counsel.

WILLIAM HENRY WHITE,

Assistant Corporation Counsel.



IN THE
SUPREME COURT OF THE UNITED STATES.
OCTOBER TERM, 1910.

Original, No.

IN RE WALTER J. GREGORY.

BRIEF FOR DISTRICT OF COLUMBIA.

The Application.

This is an application for leave to file a petition for a writ of *habeas corpus*. On December 29, 1909, the District of Columbia proceeded by information in the police court of said District against the petitioner, and charged that on a day named, and within the jurisdiction of that court, the said petitioner "did engage in the business of a gift enterprise, contrary to and in violation of section 1177 of the Revised Statutes relating to the District of Columbia" (Petition, top of page 12). An agreed statement of facts was entered into and made a part of this information (Petition, pages 13 to 28, inclusive). In pursuance to the last clause of the agreed statement of facts the petitioner's counsel moved the police court to quash the information, and that court sustained said motion for reasons given in its opinion (Petition, pages 29 to 35, inclusive).

That court stated the question as follows:

"The question is, Does the statement of facts disclose such a scheme of business, where the sale of a lawful article is accompanied by a gift of something specific and certain not attended with any element of chance and where the gift is not the real object of the sale, beyond the power of Congress to prohibit under the limitations of the Constitution, and therefore not within the provisions of the statute?" (Petition, middle of page 32).

Thereupon exception was taken to the ruling of the court. A bill of exception was presented, settled, signed, sealed, and filed, and a writ of error was allowed by the Court of Appeals of the District of Columbia (Petition, page 36).

It will be found on examination of the briefs in the Court of Appeals that neither party made any assignment of error therein. The brief for the plaintiff in error in the Court of Appeals was addressed to the following propositions:

"1. The scheme of the business in which the defendants in error are engaged constitutes a gift enterprise.

"2. If one of the elements of the consideration is immoral or against public policy the entire contract will be held illegal.

"3. The trading-stamp scheme as set forth in the Lansburgh case is not only a gift enterprise but is a species of lottery."

This case having been heard in connection with a similar and perhaps more meritorious case on the facts, the opinion of the Court of Appeals was filed in the latter case (Petition, pages 40 to 53, inclusive). It is true that the majority opinion states that "a vigorous attack has been made on the

act as unconstitutional, because it is an unreasonable interference with the freedom of trade and contract" (Petition, bottom of page 45). But the court also considered what it denominated "the legitimate character of the trading-stamp business," treated as an advertising business, and reiterated its finding in a previous case, that this business is "nothing more or less than a cunning device" (Petition, middle of page 48), thus affirming the charge made in the information that the petitioner was engaged in conducting a "gift enterprise" within the meaning of the statute. That the fact whether the defendant was conducting such an enterprise was found by the majority of the court clearly appears from the opening sentence of the dissenting opinion (Petition, page 53). It is there said:

"I cannot agree with my associates that the business here under investigation is embraced within the terms of the statute."

The dissenting opinion also stated (Petition, pages 54 and 55):

"It is conceded that the merchant himself could legally issue the stamps, redeemable by him in cash or merchandise, as an inducement to secure the patronage of the public."

It further appears that on the 31st of May, 1910, petitioner filed an application in this honorable court for a writ of certiorari, and that this application was denied on the 24th day of October, 1910; that upon the receipt of the mandate of the Court of Appeals by the police court petitioner appeared in the latter court and pleaded not guilty, and having admitted the truth of all the statements contained in the agreed statement of facts (Petition, bottom page 58), that court imposed a fine of \$100.00 and sentenced the prisoner in default of the payment thereof to be confined in the jail

for a term of 150 days (Petition, page 61). The real object of the present application, therefore, is not so much to relieve the petitioner from confinement in the District jail (from which he can be released at any time by the payment of the nominal fine imposed on him), but to review the action of this court in refusing the application for a writ of certiorari.

The Statute.

On August 23, 1871, the Legislative Assembly of the District of Columbia passed an act entitled "An act imposing a license on trades, businesses and professions practiced or carried on in the District of Columbia," the twenty-fifth section of which is as follows:

"The proprietors of gift enterprises shall pay one thousand dollars (\$1,000) annually. Every person who shall sell or offer for sale any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition or performance, or other place of amusement, with the promise, expressed or implied, to give or bestow, or in any manner hold out the promise of gift or bestowal, of any article or thing, for and in consideration of the purchase by any person of any article or thing, whether the object shall be for individual gain or for the benefit of any institution of whatever character, or for any purpose whatever, shall be regarded as a gift enterprise: *Provided*, That no such proprietor, in consequence of being thus taxed shall be exempt from paying any other taxes imposed by law, and the license herein required shall be in addition thereto."

Laws of the District of Columbia, 1871-'72.
part II, pp. 96-97.

On the 17th of February, 1873, Congress passed the following act, entitled "An act prohibiting gift enterprises in the District of Columbia":

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the act of the Legislative Assembly of the District of Columbia entitled 'An act imposing a license on trades, businesses and professions practiced or carried on in the District of Columbia, approved August 23rd, 1871, as authorizes gift enterprises therein and license to be issued therefor, is disapproved and repealed; and hereafter it shall be unlawful for any person or persons to engage in said business in any manner as defined in said act or otherwise; and any person or persons so doing on conviction thereof in the police court of said District, on information filed for and on behalf of said District in the manner provided for in the sixteenth section of the act creating the police court in said District for the enforcement of laws or ordinances of the late corporations of Washington, Georgetown and the levy court shall pay a fine of not exceeding one thousand dollars (\$1,000) or be imprisoned in the jail of the said District for a period of not less than one nor more than six months, or both, in the discretion of the court, provided that any party deeming himself aggrieved by the judgment of said court may appeal therefrom to the criminal court of said District in the manner provided for in other cases of conviction in said police court and the judgment of said criminal court shall be final."

17 Stat. at L., p. 464.

The main provisions of this act were incorporated in sections 1176 and 1177 of the Revised Statutes of the District of Columbia, which are as follows:

"SEC. 1176. So much of the act of the Legislative Assembly of the District of Columbia entitled 'An act imposing a license on trades, businesses and professions, practiced or carried on in the District of Columbia,' approved August 23rd, 1871, as authorizes gift enterprises therein, and license to be issued therefor, is disapproved and repealed, and hereafter it shall be unlawful for any person or persons to engage in said business in any manner as defined in said act or otherwise."

"SEC. 1177. Every person who shall in any manner engage in any gift enterprise in the District shall on conviction thereof in the police court on information filed for and on behalf of the District, pay a fine not exceeding one thousand dollars (\$1,000) or be imprisoned in the District jail not less than one nor more than six months, or both, in the discretion of the court."

Apparently the Legislative Assembly determined that certain enterprises, whereby real estate was offered for sale or merchandise was sold, accompanied by promises to bestow gifts of articles in consideration of the purchase of other articles, both for individual gain or for the benefit of institutions, at places where tickets of admission were required, necessitated that such places or enterprises should pay a license tax, and, therefore, passed its act of August 23, 1871. A change of policy occurred in 1873, and Congress determined that these enterprises should be unlawful. The act of February 17, 1873, as noted, declares "hereafter it shall be unlawful for any person or persons to engage in said business in any manner as defined in said act or otherwise"—

that is to say, gift enterprises as defined in the act of the legislative assembly were declared unlawful, *and in addition thereto every other gift enterprise*. These provisions were carried into the Revised Statutes of the District of Columbia, and section 1176 thereof declares both classes of business to be unlawful, while section 1177 punishes "every person who shall in any manner engage in *any gift enterprise*." It has been noted that the petitioner was not charged with a violation of section 1176, which particularly defines a gift enterprise by reference to the provisions of the act of the Legislative Assembly, but that he was charged, tried, and convicted under section 1177, which deals with all gift enterprises. It would seem clear that section 1177 does prohibit a class of lottery which has been prohibited in a large majority of the States. Whether in this case there was error in deciding that the Sperry and Hutchinson Company were not engaged in conducting a lottery, known as a gift enterprise, is unimportant and does not involve the jurisdiction of the police court.

The contention of petitioner's counsel is that petitioner was not convicted under section 1177 of conducting a gift enterprise, as that term is generally understood, but as defined by section 1176.

There are three answers to this:

(a) In section 1176, which makes it unlawful to "engage in said business in any manner as defined in said act *or otherwise*;" "otherwise" means as prohibited by section 1177, or under the general meaning of the words "gift enterprises."

(b) The determination as to whether the facts in evidence at the trial of the petitioner are sufficient to convict him of "engaging in said business in any manner as defined in said act" is necessary, and having determined that they are not, then it is necessary to further determine

whether the facts warrant a conviction for engaging in the business, "otherwise"—*i. e.*, by conducting a business having elements of chance, placing it in the class of lotteries.

(c) Even if the court could go so far it would find that Congress had authority under the police power to prohibit the business defined in the said act of August 23, 1871.

(b) "It is not proper for this court, * * * on the writ of *habeas corpus* to determine the question as to whether the scheme is a lottery. *In re Cortes*, 136 U. S., 330; *Stevens vs. Fuller*, 136 U. S., 468."

Havner vs. U. S., 143 U. S., 577.

"A writ of *habeas corpus* * * * cannot perform the work of a writ of error."

In re Cortes, 136 U. S., 334.

"We are of opinion that the order of the circuit court must be affirmed. The matters alleged before that court against the action of the commissioners did not go to the question of his jurisdiction, so as to make such action reviewable on *habeas corpus* by the circuit court. He had jurisdiction of the subject-matter and of the person of Stevens."

Stevens vs. Fuller, 143 U. S., 477.

"Nor is any inquiry into the innocence or guilt of the accused permissible."

Carter vs. McCloughry, 183 U. S., 365, 381.

"The only ground on which this court, or any court, without some special statute authorizing it, will give relief on *habeas corpus* to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the

cause, or some other matter rendering its proceedings void."

Ex parte Seibold, 100 U. S., 371, 375.

"It is an attempt to substitute a writ of *habeas corpus* for a writ of error, and to review the proceedings in a criminal case in the State court by such collateral attack rather than by direct proceedings in error—something which this court has repeatedly said ought seldom to be done."

State vs. Massachusetts, 183 U. S., 138, 141.

A review of the facts will disclose it to be a question as to whether or not there is a sufficient element of chance to make the scheme a lottery within the general definition of gift enterprises. Every contention of petitioner was made before the trial court and the Court of Appeals, as shown by the opinions of those courts. The dissenting opinion of Mr. Justice Van Orsdel in the Court of Appeals is specifically upon the ground that the proof fails to show petitioner guilty under or to bring his acts within the terms of the act of Congress. He said:

"In my opinion, the question of the constitutionality of the statute is not before us, as the matter here involved cannot be brought within its provisions. Such statutes are to be strictly construed, and no reasonable construction of this statute can bring the transactions here involved within its provisions. It is unnecessary to discuss in this connection the power of Congress, under the exercise of the police power, to regulate or suppress these stamp enterprises, since that question, in my judgment, is not here presented. The mere fact that the profits of the business have been large, or that a middleman is involved, is not sufficient to bring it by implication within the terms of the statute."

For the above reasons alone it is submitted that this court will not grant the writ.

(c) Section 1176, carrying as it does the definition of the act of 1871, is constitutional.

The objection that it is so broad as to prohibit gifts, by merchants, with sales of merchandise in ordinary course of business is fully answered by the cases in this court reviewed in *Lansburgh vs. D. C.*, 11 App. D. C., 525. Such cases apply the usual rules of construction:

"In such case the statute will be allowed its full force and operation, as applicable to all cases, rightfully and constitutionally within its provisions, but such application will be restrained as to those objects simply to which the statute is forbidden to extend. This is the rule, as we understand it, upon which the Supreme Court acted in the *State Freight Tax Case*, 15 Wall., 232; *Supervisors vs. Stanley*, 105 U. S., 305, 313; *Virginia Coupon Cases*, 114 U. S., 269, and other cases that could be cited. *Chapman vs. United States*, 5 App. D. C., 122, 131; see also *In re Chapman*, 166 U. S., 667."

The views of the leading counsel for the petitioner coincide with the construction mentioned. Mr. A. S. Worthington, for the plaintiff in error (in the *Lansburgh case*), argued:

1. Reasonably construed, section 1177 applies only to gift enterprises in which the distribution of gifts or prizes is in some way regulated by lot or chance. The trading-stamp business as carried on by the defendants contains no element of chance. Every customer of the stores engaged in the business who pays cash for what he purchases is entitled to demand and receive stamps to the extent of one stamp for every ten cents' worth purchased, and every such customer, when he has accumulated nine hundred and ninety of the

stamps, is entitled to demand of the trading company at its stores that they be exchanged for such articles as he may select. Every customer whose purchases amount to ten cents or more is entitled to the benefit of the discount, and the discount is the same to everybody. This prosecution, therefore, cannot be sustained, unless it be determined that Congress has undertaken to prohibit every person who has anything to sell from offering a gift or discount to anybody who will buy that thing.

So far as we have been able to find, every case sustaining a prosecution under anti-lottery or anti-gift enterprise statutes has been a case in which the defendant had either distributed prizes among persons chosen by lot or chance or had distributed to all his customers prizes of unequal value, the person who was to receive each prize being determined by lot or chance. Rarely indeed has any prosecution been ever attempted where, as in this case, the element of chance is entirely eliminated, and in every such instance the courts have acquitted the defendants, either because the law was void or because, properly construed, the defendant had not violated it. *People vs. Gillson*, 109 N. Y., 395, 399; *Long vs. State*, 73 Md., 527; S. C., 74 Md., 565; *Yellow Stone Kit vs. State*, 88 Ala., 196; *State vs. Randle*, 41 Texas, 292; S. C., 42 Tex., 580.

It may be contended that the language of section 1177 is so broad that it cannot reasonably be restricted in its application to immoral gift enterprises. The language used is, indeed, exceedingly general. The definition of "gift enterprise," as contained in the act of the Legislative Assembly, was very comprehensive, and the act of 1873, as carried into sections 1176 and 1177, makes it unlawful to engage in a gift enterprise business in the manner defined by the Legislative Assembly "or otherwise." The Legislative Assembly was providing for the licensing of gift enterprises. Its object was to include everything that might possibly go by

that name, so as to enhance the revenues of the District. A liberal construction would be applied in such a case. The purpose of Congress, on the contrary, it must be supposed, was to protect the morals of the community—to prevent a species of gambling. Hence a different rule must be applied in construing the act of Congress. Many cases might be referred to in which language as broad as this has been narrowed by construction so as to apply only to what was obviously within the intent of the law-making power. *In re Chapman*, 166 U. S., 661, 667; *United States vs. Kirby*, 7 Wall., 482.

Lansburgh vs. D. C., 11 App. Cases D. C., 517-519.

We invite attention to the authorities reviewed in the opinion of the Court of Appeals in the case of *D. C. vs. Krafts*, attached to the petition in this cause, and to the opinion itself, particularly to the case of *Knoxville Iron Co. vs. Harbison*, 183 U. S., 13.

The presumption is that all acts of the legislature are passed in the utmost good faith, and also that they are conformable to the Constitution.

Powell vs. Pa., 127 U. S., 678-685.

It is not until the unconstitutionality of a given act is plainly made to appear that the court is called upon to declare it void.

State vs. Dist. of Nar., 16 R. I., 424.

“The gift enterprise is a species of lottery.”

19 Am. & Eng. Ency. of Law, 2d ed., p. 590, citing *Meyer vs. State*, 112 Ga., 20; *Reg. vs. Harris*, 10 Cox C. C., 352; *Reg. vs. Freeman*, 18 Ont., 524; *Cross vs. People*, 18 Colo., 321; *Dunn vs. People*, 40 Ill., 465; *Davenport vs. Ottawa*, 54 Kansas, 711; *State vs. Moren*, 48 Minn., 555; U. S. *vs. Wallis*, 58 Fed. Rep., 942; *State vs. Mumford*, 73 Mo., 647; *Reg. vs. Parker*, 9 Manitoba, 203; *Randle vs. State*, 42 Texas, 580; *State vs. Bryant*, 74 N. Car., 207.

A gift enterprise is "in common parlance a scheme for the distribution of certain articles of property to be determined by chance among those who have taken shares in the scheme."

20 Cyc., 1188.

"The phrase (gift enterprise) has attained such notoriety as to justify us in taking judicial notice of what is meant and understood by the use of it."

Lohman vs. State, 81 Ind., 15, 18.

In the celebrated case of *Horner vs. United States*, 147 U. S., 449, the court reviewed the plan of Austria to obtain a loan on bonds by which the purchaser of the bonds must certainly get his money back with interest. The plan, however, contemplated the awarding by chance of additional bonuses among the bondholders, and also left the periods of maturity of the bonds to be determined by chance within certain fixed and named limitations. The court, on pages 461 and 462, review and quote with approval the decision in *Ballock vs. State*, 73 Md., 1, to the effect that the uncertainty as to the time of maturity of the bonds was alone sufficient to condemn the whole plan as "in the nature of a lottery."

The constitutionality of section 1177 cannot be assailed. *In re Rapier*, 143 U. S., 110; *Horner vs. U. S.*, 143 U. S., 207.

Jurisdiction of the Police Court.

It is not claimed that the police court was without jurisdiction to punish the offense of conducting a gift enterprise or that the Court of Appeals was without jurisdiction to review the decision of that court. The police court therefore had *power* to impose the sentence complained of by the petitioner in this case. This court will only examine the record to ascertain whether the police court exceeded its authority (*Ex parte Lange*, 18 Wallace, 163; *Ex parte Parks*, 93 U. S., 18). In the latter case Parks applied to this honorable court

for a writ of *habeas corpus* on the ground that he was in custody under a sentence which was void and in law a nullity for want of jurisdiction of the court to pass it upon and against him.

Parks was convicted of forgery in the United States district court for the western district of Virginia. He claimed that he was illegally convicted because the act for which he was convicted was not a crime against the United States, and he applied to the circuit court for a *habeas corpus*, and after hearing was remanded into custody. He then applied to the Supreme Court for a *habeas corpus* (18). He was charged with forgery for the purpose of authenticating the commencement of proceedings in a bankruptcy case (19). It was claimed that this was not an offense against the United States (20).

"But the question whether it was or was not a crime within the statute was one which the district court was competent to decide. It was before the court and within the court's jurisdiction. No other court, except the circuit court for the same district, having concurrent jurisdiction, was as competent to decide the question as the district court" (p. 20). "The court may err, but it has jurisdiction of the question" (p. 20). "But where the proceedings are not only erroneous, but entirely void—as where the court is without jurisdiction of the person or of the cause, and a party is subjected to a legal imprisonment in consequence—the superior court, or judge invested with the prerogative power of issuing a *habeas corpus*, may review the proceedings by that writ and discharge from illegal imprisonment" (p. 21).

"But if the court had jurisdiction and power to convict and sentence, the writ cannot issue to correct a mere error. We have shown that the court had the power to determine the question before it; and that this is so, is further manifest from the language of Chief Justice Marshall in the case of Tobias Watkins, 3 Pet., 203. He there says: 'To determine whether the offense charged in the indictment be legally

punishable or not, is among the most unquestionable of its (the court's) power and duties" (p. 23).

"Does the ground of this application go to the jurisdiction on authority of the Supreme Court of the District or rather is it not an allegation of mere error? If the latter it cannot be reviewed in this proceeding. *In re Schneider*, 148 U. S., 162 and cases cited."

"The general rule is that the writ of *habeas corpus* will not issue unless the court, under whose warrant the petitioner is held, is without jurisdiction; and that it cannot be used to correct errors."

In re Belt, 159 U. S., 95, 97, 98, 100.

In re Eckart, 166 U. S., 481, 485.

Andrews vs. Schwartz, 156 U. S., 272, 276.

Peckham vs. Henkel, 216 U. S., 483, 487.

In *Ex parte Bigelow*, 113 U. S., 328, the writ was refused where defense of former jeopardy was denied by the Supreme Court of the District of Columbia for the reasons:

"That court had jurisdiction of the offense described in the indictment on which the prisoner was tried. It had jurisdiction of the prisoner, who was properly brought before the court. It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and decide upon the defenses offered by him. The matter now presented was one of these defenses. Whether it was a sufficient defense was a matter of law on which the court must pass so far as it was purely a question of law, and on which the jury under the instructions of the court must pass if we can suppose any of the facts were such as required submission to the jury."

Ex parte Bigelow, 113 U. S., 330.

The court also said:

"No appeal or writ of error in such case as that lies to this court. The act of Congress has made the judgment of that court conclusive, as it had a right

to do, and the defendant, having one review of his trial and judgment, has no special reason to complain."

Ex parte Bigelow, 113 U. S., 329.

"In the Federal courts, however, it is well settled that upon *habeas corpus* the court will not weigh the evidence, although if there is an entire lack of evidence to support the accusation the court may order his discharge. In this case, however, the production of the indictment made at least a *prima facie* case against the accused, and if the commissioner received evidence on his behalf it was for him to say whether upon the whole testimony there was proof of probable cause. *In re Oteiza*, 136 U. S., 330; *Bryant vs. U. S.*, 167, U. S., 104."

Hyde vs. Shine, 199 U. S., 84.

"It is well settled by a series of decisions that this court, having no jurisdiction of criminal cases, by writ of error or appeal, cannot discharge on *habeas corpus* a person imprisoned under the sentence of a circuit or district court in a criminal case unless the sentence exceeds the jurisdiction of that court, or there is no authority to hold him under the sentence."

Ex parte Wilson, 114 U. S., 417, 420.

In conclusion, as it does not affirmatively appear from the petition and record in this case that the sentence of the police court was void because of the unconstitutionality of the act of Congress under which he was prosecuted, it is respectfully submitted that the application for leave to file the petition for writ of *habeas corpus* should be denied.

Respectfully submitted,

EDWARD H. THOMAS,

WILLIAM HENRY WHITE,

For District of Columbia.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

Original, No.

IN RE WALTER J. GREGORY, PETITIONER.

**BRIEF IN OPPOSITION TO APPLICATION FOR
WRIT OF HABEAS CORPUS.**

Statement of the Case.

Application having been made to this court for leave to file petition for the writ of *habeas corpus* the petition was allowed to be filed and the warden of the jail of the District of Columbia was directed to show cause why said writ should not issue. The return of the warden, in response to the rule, discloses that the police court of the District of Columbia has original jurisdiction by virtue of certain acts of Congress of crimes and offenses as set forth in sub-chapter 2 of chapter 1 of an *Act to Establish a Code of Law for the District of Columbia*, approved March 3, 1901 (see sections 42 to 59, inclusive, Annotated Code, D. C.). Said court also has jurisdiction of offenses against the act of Congress entitled "An act prohibiting gift enterprises in the District of Co-

lumbia," approved February 17, 1873 (17 Stats. at Large, 464), as incorporated in sections 1176 and 1177 of the Revised Statutes of the United States relating to the District of Columbia. The act of Congress of February 17, 1873, above mentioned, provided that the proceedings in said police court should be on information for and on behalf of said District, and section 44 of the code of law for the District of Columbia provides, "That prosecutions in the police court shall be on information by the proper prosecuting officer."

In the December term, 1910, of said police court the District of Columbia, by its proper officer, proceeded by information against the petitioner, Walter J. Gregory, and charged him with engaging in the business of a gift enterprise contrary to and in violation of section 1177 of the Revised Statutes of the United States relating to the District of Columbia. Thereafter on the 31st day of November, 1910, the said petitioner, Walter J. Gregory, appeared in said court and entered his plea of not guilty to said information, expressly waived a trial by jury, and requested that he be tried by the judge presiding in said court. On the next day (November 5, 1910) counsel for the respective parties in said cause filed a stipulation which admitted the truth of all the statements contained in an agreed statement of facts set forth in the said petition (see petition, commencing at the bottom of page 12 thereof and ending at the bottom of page 28 thereof).

The said stipulation contained the agreement that the case shall be submitted to the judge presiding in said court upon said agreed statement of facts, and the petitioner in open court admitted the said statement of facts to be true. Thereupon on the 7th day of November, 1910, the said petitioner and his counsel being present in open court, the said police court adjudged said Walter J. Gregory guilty of the offense charged in said information and sentenced him to pay a fine of one hundred (\$100.00) dollars and in default thereof

to be imprisoned in the District jail for one hundred and fifty (150) days. Said petitioner refused to pay this fine and was therefore and thereupon duly committed to the custody of the warden of the jail of the District of Columbia, and by him held until released by the order of this court on giving bail.

The Code provides (Sec. 47) :

“In all cases tried before said court the judgment of the court shall be final, except as hereinafter provided.”

The judgment of the police court is reviewable by the Court of Appeals of the District of Columbia, under section 227 of the Code. This section in substance requires that exception be taken, reduced to writing and stated in a bill of exceptions to be settled and signed by the judge within such time as may be prescribed by rules and regulations which shall be made by the Court of Appeals of the District of Columbia, and that any justice of that court, if of opinion that the matter should be reviewed, may allow a writ of error. Any party desiring the benefit of the provisions of this section shall give notice in open court of his intention to apply for a writ of error upon such exceptions and thereupon proceedings therein shall be stayed for 10 days. No exception was taken to the ruling of said court adjudging said petitioner guilty of the offense of conducting a gift enterprise nor was any notice given for or on behalf of the petitioner of intention to apply to the Court of Appeals for writ of error nor was any bill of exceptions reserved, settled, signed or sealed in respect to said judgment and sentence of said court.

It is true that the case had been previously heard on a motion to quash the information by the Court of Appeals on writ of error sued out by the District of Columbia pursuant to the last clause of the agreed statement of facts which is as follows:

"It is hereby stipulated that this agreed statement of facts shall be considered as a part of the information in this case and that the defendant shall file a motion to quash the information and the cause will be heard on said motion" (Petition, page 28).

The agreed statement of facts was made a part of the information for the purposes of the motion to quash in order that the District of Columbia might have an opportunity to review the ruling of that court on said motion, but we do not admit that the agreed statement of facts is a part of the information for the purpose of a trial on the merits. It was necessary, after the ruling of the police court quashing the information had been reversed by the Court of Appeals, to again agree upon the facts, and that was done in the manner hereinbefore mentioned. But for the fact that the agreed statement of facts had been made a part of the information, for the purpose of the motion to quash, the Court of Appeals would have declined to review the action of the police court on writ of error procured by the District of Columbia (U. S. vs. Evans, 30 App. D. C., 59; D. C. vs. Burns, 32 App. D. C., 203).

The Statutes Involved.

18 Stat. at L. 472

The act approved June 30, 1864, ~~page 172~~, entitled "An act to provide internal revenue to support the Government, pay interest on the public debt and for other purposes," by section 41 thereof, provided as follows:

"Forty-one. Proprietors of gift enterprises shall pay fifty dollars for each license. Every person, firm, or corporation, who shall sell, or offer for sale, any article of merchandise of any description whatsoever, with a promise, express or implied, to give or bestow, or in any manner to hold out to the public the promise of gift or bestowal of any article or thing for and in consideration of the purchase by any person

of any other article, or thing, shall be regarded a proprietor of a gift enterprise under this act: *Provided*, That no such proprietor, in consequence of being thus licensed, shall be exempt from paying any other license or tax required by law, and the license herein required shall be in addition thereto."

The act of Congress approved June 13, 1866, chapter 184, entitled "An act to reduce internal taxation and to amend an act entitled 'An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes,' approved June 30, 1864, and acts amendatory thereof," by section 41 provided as follows:

"Forty-one. Proprietors of gift enterprises shall pay one hundred and fifty dollars. Every person, firm, or corporation who shall sell or offer for sale any real estate or article of merchandise of any description whatsoever, or any ticket of admission to any exhibition or performance, with a promise, express or implied, to give or bestow, or in any manner hold out the promise of gift or bestowal of any article or thing for and in consideration of the purchase by any person of any other article or thing, shall be regarded as a proprietor of a gift enterprise: *Provided*, That no such proprietor, in consequence of being thus taxed, shall be exempt from paying any other tax imposed by law, and the special tax herein required shall be in addition thereto."

14 Stats. at Large, p. 120.

The late Legislative Assembly of the District of Columbia adopted many provisions of the act of June 30, 1864, for the purpose of obtaining revenue in this District, in its act of August 23, 1871, entitled "An act imposing a license on trades, businesses, and professions practiced or carried on in the District of Columbia." The 25th section of this act is in many respects similar to the provisions of section 41 of the act of June 30, 1864, and reads as follows:

"The proprietors of gift enterprises shall pay one thousand dollars (\$1,000) annually. Every person who shall sell or offer for sale any real estate or article of merchandise of any description whatever, or any ticket of admission to any exhibition or performance, or other place of amusement, with the promise, expressed or implied, to give or bestow, or in any manner hold out the promise of gift or bestowal, of any article or thing, for and in consideration of the purchase by any person of any article or thing, whether the object shall be for individual gain or for the benefit of any institution of whatever character, or for any purpose whatever, shall be regarded as a gift enterprise: *Provided*, That no such proprietor, in consequence of being thus taxed shall be exempt from paying any other taxes imposed by law, and the license herein required shall be in addition thereto."

Laws of the District of Columbia, 1871-'72,
part II, pp. 96-97.

On the 17th of February, 1873, Congress passed the following act, entitled "An act prohibiting gift enterprises in the District of Columbia":

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the act of the Legislative Assembly of the District of Columbia entitled 'An act imposing a license on trades, businesses and professions practiced or carried on in the District of Columbia, approved August 23rd, 1871, as authorizes gift enterprises therein and license to be issued therefor, is disapproved and repealed; and hereafter it shall be unlawful for any person or persons to engage in said business in any manner as defined in said act or otherwise; and any person or persons so doing on conviction thereof in the police court of said District, on information filed for and on behalf of said District in the manner provided for in the sixteenth section of the act creating the police court in said District for the enforcement of laws or ordi-

nances of the late corporations of Washington, Georgetown and the levy court shall pay a fine of not exceeding one thousand dollars (\$1,000) or be imprisoned in the jail of the said District for a period of not less than one nor more than six months, or both, in the discretion of the court, provided that any party deeming himself aggrieved by the judgment of said court may appeal therefrom to the criminal court of said District in the manner provided for in other cases of conviction in said police court, and the judgment of said criminal court shall be final."

17 Stat. at L., p. 464.

The main provisions of this act were incorporated in sections 1176 and 1177 of the Revised Statutes of the District of Columbia, which are as follows:

"SEC. 1176. So much of the act of the Legislative Assembly of the District of Columbia entitled 'An act imposing a license on trades, businesses and professions, practiced or carried on in the District of Columbia,' approved August 23rd, 1871, as authorizes gift enterprises therein, and license to be issued therefor, is disapproved and repealed, and hereafter it shall be unlawful for any person or persons to engage in said business in any manner as defined in said act or otherwise.

"SEC. 1177. Every person who shall in any manner engage in any gift enterprise in the District shall on conviction thereof in the police court on information filed for and on behalf of the District, pay a fine not exceeding one thousand dollars (\$1,000) or be imprisoned in the District jail not less than one nor more than six months, or both, in the discretion of the court."